TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~273.~~ 79

LEMUEL W. MASON, APPELLANT,

vs.

EDWARD A. ROLLINS, COMMISSIONER OF INTERNAL REVENUE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 31, 1870.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, sitting in chancery, at the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and, in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Wednesday, the fifteenth day of December, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-fourth year.

WILLIAM H. BRADLEY, *Clerk.*

LEMUEL W. MASON
vs.
EDWARD A. ROLLINS, COMMISSIONER OF THE Internal Revenue; W. B. Allen, collector; and Duncan Ferguson, assessor. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, on the ninth day of November, in the
2 year of our Lord one thousand eight hundred and sixty-eight, came Lemuel W. Mason, complainant, by Edward Roby, esq., his solicitor, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his bill of complaint against Edward A. Rollins, Commissioner of the Internal Revenue; W. B. Allen, collector; and Duncan Ferguson, assessor, defendants; and also, at the same time, filed his bond for costs in said entitled cause; which said bond and bill are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court—term, A. D. 1868.

LEMUEL W. MASON
vs.
EDWARD A. ROLLINS, W. B. ALLEN, AND Duncan Ferguson. } In chancery.

I enter myself security for costs in this cause, and promise to
3 pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by the plaintiff, hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 9th day of November, A. D. 1868.

JNO. P. FURLONG.

(Endorsed:) Filed Nov. 9th, A. D. 1868. W'm H. Bradley, clerk.

Bill of complaint.

U. S. circuit court, N. dist. of Illinois, in chancery.

LEMUEL W. MASON
vs.
EDWARD A. ROLLINS, COM'R INT. REV.; WILLIAM B. ALLEN, collector; and DUNCAN FURGASON, assessor.

To the judges of the circuit court of the United States for the northern district of Illinois:

Lemuel W. Mason, of Clintonville, in the county of Kane, and State of Illinois, and a citizen of the State of Illinois, brings this his bill
4 against Edward A. Rollins, of Washington, in the District of Columbia, and a citizen of the State of , Commisioner of the Internal Revenue; and William B. Allen, collector; and Duncan Furgason, assessor, residents and citizens of said State of Illinois.

And thereupon your orator complains and says that your orator is the owner of a term of years in a certain tract or parcel of land, situate in the county of Kane, and State of Illinois, in the northern district of Illinois, which is known and more particularly described as follows, viz: All that portion of block one, (1,) in the village of East Clinton, according to Truman Gilbert's plat of said village, which is recorded in said Kane County, which is bounded as follows: On the east by the Chicago and Northwestern Railway Company's land, on the south by Middle street, on the north by the center line of said block, and on the west by a line nine rods east of the west line of said block one, (1,) and parallel thereto, together with the alcohol house situate thereon, and all the appurtenances and steam and other pipes connected therewith, and the right fully and freely to use all said premises and property
5 for the full term of three years, commencing on the first day of September, A. D. 1868, and ending on the first day of September, A. D. 1871, conditioned only upon your orator's paying the rents and performing the covenants entered into and agreed to be paid and performed by him in and by his lease thereof.

And your orator further shows that, in and by a certain indenture of lease, bearing date the first day of July, A. D. 1868, were leased to your orator on that day all of the said land and premises, with the alcohol house situate thereon, with the appurtenances and pipes therewith connected, and with the use of steam to be supplied from the steam-boilers of the distillery adjacent thereto, for the purpose of carrying on said alcohol house and running the machinery now on said premises, or to be placed thereon by your orator, and the alcohol still now on said premises, and any other stills which your orator may place thereon, to have and to hold all the said premises, property, and appurtenances unto your orator, his executors, administrators, and assigns, from the first day of September, A. D. 1868, during and until the first day of September, A. D. 1871, yielding possession and paying rent therefor as here-
6 inafter stated.

And in and by said lease, in consideration of the leasing aforesaid, your orator covenanted, under his hand and seal, to pay as rent for the said premises, privileges, and property the sum of five thousand dollars per annum, and to leave upon said premises, at the expiration of said lease, all machinery, stills, and other improvements which your

orator may place thereon, which rent was, by the terms of said lease, made payable, and your orator did therein and thereby agree to pay the same quarterly, at the end of each quarter, and is now liable to pay the same at the times when it shall become due as aforesaid.

And your orator further says that he (your orator) is by trade a distiller and rectifier, and has attained skill and experience therein by great labor and application; that he is poor, and dependent upon his skill and labor for his support; that he leased said premises and property and appurtenances for the purpose of using the same as a rectifying establishment, and such other business as he might deem profitable to be carried on thereon; and that he intended to gain his livelihood, together with the means to pay said rents, for which he is bound, from the profits of rectifying and distilling to be carried on upon said premises by him as aforesaid; and that he has very little property, and by no means sufficient to carry on such business as aforesaid; and that he intended and desired to obtain credit and to pledge as security therefor his goods and chattels and stock, and other property to be by him used in and about his said business, and upon said premises.

7

And your orator further says that on the opposite side of the street from said premises, and 200 feet distant therefrom, is the distillery above mentioned, which distillery is licensed and running; and that the most distant boundary of your orator's said premises is distant less than 400 feet from said distillery.

And your orator further shows that the Congress of the United States did enact and pass a statute entitled "An act imposing taxes on distilled spirits, tobacco, and for other purposes," which was approved July 20th, A. D. 1868, a printed copy of which act is annexed to this bill as a part thereof, wherein and whereby divers weighty and grievous oppressions were enacted, to the destruction of your orator, divesting him of his rights in the said property, and forbidding any use thereof in the manner in which it was intended to be used, or for any purpose for which it was intended to be used, and especially requiring any person who shall carry on the business of a distiller, rectifier, or manufacturer of stills to give a bond to the United States, with sureties, in a great sum before he may enter upon said business, which bond your orator is unable to give or procure, nor can he own his said land in fee free from all incumbrances, nor his said chattels, nor is he able to own any larger or other estate therein than as above set forth; and said statute doth otherwise oppress your orator, in that it forbids the use of any distillery or rectifying establishment within 600 feet of any licensed distillery, and doth authorize and allow the Commissioner of the Internal Revenue to prescribe rules and regulations for the government of persons engaged in the vocations mentioned therein, and doth permit the assessor and collector of the district to control many of the acts of such persons so engaged in said vocations, and doth empower said officers, and many others who are not officers of the peace, whose names are to your orator unknown, but who are described in said act as supervisors, *guagers*, detectives, storekeepers, and divers other designations, to trespass upon and search and seize the property described and mentioned in said act, without warrant or color of authority, save as in said act contained, and to command and compel all persons engaged in the vocations aforesaid, and their servants, and to divers other outrageous and unwarrantable and *tyranical* acts, and many other great and grievous oppressions and unwarrantable usurpations are in

8

9

said act contained, as by the said act itself do fully appear, by reason whereof your orator saith that all said act is unconstitutional, null, and void, save only in those parts laying taxes and excises, and requiring payment thereof, and those parts respecting other statutes.

And said Congress did also enact another statute entitled "An act to exempt certain manufactures from internal tax, and for other pur-
10 poses," which act was approved March 31st, A. D. 1868, a printed copy of which act is hereto annexed as part of this bill, and your orator says that sections 5 and 7 of said last-named act are unconstitutional, null, and void.

And your orator further shows that the defendant Rollins, as Commissioner of the Internal Revenue mentioned in said acts, and by color of said acts and divers other acts alike unconstitutional and void, hath issued divers rules and regulations and instructions to the said defendants Allen and Furgason, and to divers other revenue officers, commanding them to do many acts inconsistent with the liberty of your orator, and with his rights in and about the premises and vocations aforesaid, and also divers rules and regulations and prescriptions for the government of persons who shall pursue said vocations, and for the government and control of their property, all of which rules, regulations, and prescriptions, and instructions are usurpations, unwarranted, null, and void. Many of them, your orator believes, are secret, and he is unable to ascertain what they are; a portion thereof he hath obtained, and printed copies thereof are hereto annexed as part of this bill.

11 And your orator further says that he is informed and believes that the defendants, and all other said revenue officers, do intend to obey said acts of Congress, and the rules, instructions, regulations, and prescriptions of said Commissioner, and, in case your orator or his assigns shall in any manner exercise their rights in contravention thereof, threaten him and his property to seize, prosecute, and destroy.

And your orator says that by reason of the penalties imposed by said acts dares not do anything whatsoever to obtain any income from his said property, and by reason of all the unconstitutional provisions of said acts and the *threatend* doings of said defendants and others under color of said acts, your orator cannot obtain the services of any person to assist him about his said business, or any other he may undertake upon said premises in connection therewith; and he cannot rent or sell his said interest, nor in any manner obtain any return therefrom; but that his property therein is wholly destroyed, and, unless the injunction which is herein prayed be granted immediately, great and
12 irreparable injury will be done to your orator in this, that he will become bankrupt, and be compelled to lose all his property of every kind; that his business credit will be destroyed; his skill and secrets in and about his art, trade, and mystery will be taken away from him and published; his profits utterly lost; and even his means of livelihood and present support will be imperilled, and divers other things tending to the utter destruction of your orator will obtain.

And your orator says that no person will be accountable to him in damages by reason of said destruction, save only for the immediate effect of corporal trespasses; therefore he says he has no remedy or redress whatever at law for these wrongs.

And your orator further says that he is ready and willing to pay all taxes and excises which are or may become due from him in good faith as soon as the same are levied or in any manner become due.

Amendments to bill.

13 That after the 10th day of September, and before the filing of said bill, the defendants Allen and Ferguson, and divers other persons under and in pursuance of their direction, have separately and together at divers times entered upon the lands, premises, and alcohol house of this plaintiff, which are particularly described in his said bill, without the authority or consent of this plaintiff, and have trespassed thereon in each and every such entry to the damage and vexation of this plaintiff.

And on or about the 30th day of October, A. D. 1868, now last past, the said Allen, collector, and Ferguson, assessor, under color and for the execution of the acts of Congress set forth in said bill in their official capacity, and, as this plaintiff is informed and believes, also under the direction and in pursuance of the regulations and requirements of said Rollins, Commissioner, &c., did, without the consent of this plaintiff, enter upon the premises aforesaid, and into said alcohol house, and did inspect and follow out the several pipes and connections there found, and did compel and require the presence of an artizan or mechanic, with suitable tools, and required and caused the said

14 mechanic to dismantle said alcohol still, and disconnect certain of the pipes thereof, and to injure and so derange the same that it, said still, cannot be used, and did by said trespasses and unlawful acts greatly damage the property of this plaintiff.

And this plaintiff further saith that on or about the first day of November, A. D. 1868, said Ferguson did, as assessor as aforesaid, say to the lessee and occupant of the distillery mentioned in said bill of complaint, "that the steam-pipe," connecting said alcohol still with the steam-boilers of said distillery, being the pipes appurtenant to the said alcohol still, and through which the steam is to be supplied to said still from the steam-boilers aforesaid, "must be taken out," and did then and there, to wit, before the filing of complainant's said bill, command said lessee of said distillery to remove and take out said pipes altogether, and did say said pipes would have to be taken out; all which requirements and commands of the said Ferguson, as assessor as aforesaid, this plaintiff is informed and believes were given and made as above set forth, and have never been revoked.

15 And this plaintiff believes that said Ferguson did command and require the removal of said pipes, as aforesaid, for the purpose of preventing this plaintiff from having any benefit from the said steam-pipes, and from obtaining and having furnished to him the steam to run his said alcohol house according to the terms of his said lease, and to *harras* and vex this plaintiff and destroy his property, and to carry said statutes into effect, and to execute the acts of Congress set forth in his said bill of complaint.

And this plaintiff is further informed and believes that, at the time last aforesaid, said Ferguson, as assessor, did claim the right to remove said pipes and compel the same to be done, and did threaten to take away and remove said pipes and appurtenances to the constant annoyance, vexation, and distress of this plaintiff, and doth, by his said acts and threats, make the value of this plaintiff's right to steam by virtue of his said lease, of no account, and doth utterly divest the said covenant to furnish steam of all value in market, either for sale or lease.

And plaintiff further says that, but for the threats of said

16 defendants and the said acts of Congress, said right to steam

would be worth a great sum, viz, $1,000 00 and upwards, and that said pipe is laid in the ground, and if taken out could not be replaced except at great expense during the winter; and further, that by means thereof the lodging-rooms in said house are heated, and the removal of said pipes would destroy the value of all the heating arrangements now in daily use in said building.

And this plaintiff further states that the pipes and connections of the said alcohol still are the true and proper appurtenances of the said alcohol house, erected and placed in a proper and legal manner for the prosecution of a lawful business, for the following reasons, viz: That in the year 1867 the owner of the adjacent distillery, having become convinced (as this deponent is informed and verily believes) that the manufacture of high-wines from grain could not be made a profitable business under existing laws; that the high-wines were a crude article, and only valuable in market because purchased for the purpose of redistilla-
17 tion and refinement into alcohol, cologne, spirits, and other fine spirits of great value for medical, mechanical, and other general consumption; and that the manufacture of such pure or refined spirits by distillation from grain and immediate redistillation was profitable, if carefully and economically conducted, did conclude to convert the said establishment into a manufactory of such pure and refined spirits by the addition of such stills, works, and machinery as were necessary thereto.

And because the statutes of the United States did forbid the erection of rectifying and refining works on the same premises with a distillery, (by enactments which the plaintiff believes void,) the said owner, in conformity therewith and in compliance with all the requisitions and directions of the Revenue Department, did erect a building across a street and two hundred feet distant from said distillery, and did place therein the alcohol works in question, and arrange the same at a cost of about thirty thousand dollars; and because alcohol and pure spirits are very *inflamable*, and the place where the same are manufactured, stored,
18 or handled liable to become filled with explosive vapors and gasses, did arrange so that no fires need be built in or about said alcohol house, by connecting the same by steam-pipes with the steam-boilers of said distillery, and taking steam through said pipes to run said alcohol works, and heat the lodging-rooms for the watchmen and other persons connected therewith, and the office and barreling-rooms, and thereby did save very heavy expenses of insurance, amounting, as this plaintiff believes, to more than six per cent. on the value of the buildings, works, and contents per annum, (viz, more than $1,800;) and also did save the expense of an extra boiler, arch, and stack, amounting to more than $2,500 00, and the expense of a large fire thereunder, and the wages of the firemen. And said owner did also lay water-pipes, properly connected with pumps, to force the water from springs, and a stream adjacent thereto, into said alcohol works; and did also lay waste-pipes to carry away all waste fluids, all which pipes were placed as appurtenant to said alcohol works, and for the prosecution of the lawful use thereof in a lawful manner, and for no other purpose.

19 And this plaintiff further states that it is necessary to a complete alcohol works to have steam-pipes connected with steam-boilers, and water-pipes connected with a large supply of cold water, and ducts or drains to carry away waste fluids; and that without steam the distillation cannot be carried on, and without water it would be impossible to condense or obtain alcohol by distillation, and drains and

gas-pipes are appurtenant, as is well known, to all the buildings where waste fluids collect or gas can be obtained.

And this plaintiff further shows that there are now connected with said alcohol works no other pipes than the water and steam pipes aforesaid, laid and connected only as aforesaid, except a gas-main connected with gas works adjacent to said alcohol house, and at a distance from said distillery.

And said works, alcohol manufactory, and appurtenances having been completed about the first day of January, A. D. 1868, the same, including both said distillery and alcohol works, with the steam-pipes and water-pipes connected with said springs, were approved by
20 the Revenue Department of the United States, taxed and licensed, and run for many months prior to July, 1868.

And this plaintiff, not being able to carry on the whole establishment, did lease, as set forth in said bill, the said lands and alcohol house, with the appurtenances, and steam to be furnished, as in said bill of complaint alleged.

And thereafter, the said statute of July 20th, 1868, having been passed, the owner of said property did let the distillery aforesaid, with the cattle barns and appurtenances, reserving and taking a covenant from the lessee thereof that he would furnish this plaintiff steam from the steam-boilers of said distillery, in accordance with the terms of his said lease.

And thereupon said lessee paid the license-tax, and obtained a license for said distillery, and is now running the same.

And this plaintiff further states that he intends, and is about to give the notice of his intention, to run said alcohol works or rectifying establishment, as required by the statute set forth in his said bill, (except that said notice will state that said rectifying establishment is 200 feet from a licensed distillery,) and to tender to the said Allen, col-
21 lector, he being the collector of the district where said premises are situated, the license-tax upon said rectifying establishment, and thereupon to connect the pipes and portions of said alcohol works where the same were disconnected and dismantled by the authority and direction of said defendants, as above set forth, and put said works in order, and run the same as a rectifying establishment, and use the same for the business of rectifying, which business said plaintiff avers is a lawful business, and will be carried on by said plaintiff in a legitimate and correct manner, as a means of livelihood and profit, like any other trade, business, or vocation in which men engage.

And this plaintiff further states that he is informed and verily believes that said Allen, as collector, intends to refuse to accept the said tax; and that the said collector, and said Ferguson, as assessor, do intend and threaten forthwith to seize said alcohol house, and interfere by violence and force with this plaintiff and his employees in said alcohol house, and to seize the property of this plaintiff, and the
22 product of his said rectifying establishment, wherever the same may be, and to harrass and destroy this plaintiff.

And this plaintiff states that in dismantling said still as aforesaid, and in the interferances, commands, threats, and doings to prevent the use of said alcohol still, the said defendants do attack and destroy the property and rights of this plaintiff acquired under and in pursuance of the statutes of the United States, and if the acquisition or use of a rectifying establishment within six hundred feet of a licensed distillery can, in any event, be a crime or contrary to law, the statute in this be-

half is, as to the alcohol works aforesaid, ex post facto, and any proceeding against this plaintiff thereunder would be and is a trespass.

And this plaintiff further states that he is informed and verily believes that said defendants, and each and every one of them, would be deeply insolvent and bankrupt if called upon to answer for the trespasses they have already committed, and the liabilities they have incurred, and that personal judgments against them for his damages
23 in this behalf would be of no value; that their trespasses upon said works and acts of usurped authority over the same are frequent and harrassing, and for the above reasons, as well as for the reasons set forth in said bill, are working irreparable injury to this plaintiff.

And plaintiff further states that from the first day of November last to this time he has been prevented from running said alcohol works, and using the same, by the seizure and dismantling thereof, as above set forth, by said defendants Allen and Ferguson, as officers as aforesaid; and that during all said time all said defendants have exercised authority over the same, under color of said void acts of Congress, and by virtue of no other warrant or process or authority whatsoever; and that said defendants still do exercise control and authority over the same, and do prevent, by color of said acts and by no other authority whatever, the use of said works for the purposes of rectifying, as aforesaid, and manufacturing alcohol and pure and refined spirits; and this plaintiff verily believes that in starting and running said works as he is compelled to do without the protection of this court, unless the
24 injunction prayed is granted, he will come into actual collision with said officers, or their agents, and will be compelled to protect himself and his property in the prosecution of his lawful business in the manner aforesaid with force and arms and at great peril to himself.

And this plaintiff further states that the said alcohol house is built above the ground, and none of said works are in any manner concealed; that the building is separate and apart from all other buildings, by roadways, streets, and commons, or vacant lands of considerable extent; that it has no cellar, and the basement is entirely above ground at one end of the building and partly above at the other; and that said building and works are accessible from every side.

But now so it is, may it please your honors, that the said defendants, combining and confederating together, and with divers persons in great numbers, whose names are unknown to your orator, but who are, as aforesaid, described as supervisors, gaugers, detectives, storekeep-
25 ers, revenue officers, and informers, and who are, for the most part, under the direction and control of said Rollins, and confederating also and combining with divers other persons, whose names are at present unknown to your orator, all whose names, when discovered, your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendants hereto, and contriving how to wrong and injure your orator, do pretend that said acts of Congress, and the rules, regulations, and decisions aforesaid, are good and valid laws, and threaten and go about to carry the same into effect, and grievously to oppress and destroy your orator, and divest him of his property, his liberty, and his just rights.

To the end therefore that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer

make to such of the several interrogatories hereinafter numbered
26 and set forth, as by the note hereunder written, they are respectively required to answer, that is to say:

"1. Whether or no he believes himself bound by his oath and duties of office to carry said acts of Congress into full effect; and, if yea, whether or no he intends so to carry said acts of Congress into effect; and, if yea, what means he is employing and intends to employ, and by what proceedings to proceed to that end.

"2. Whether or no rules and regulations and decisions of which printed copies are annexed to his bill were issued by the defendant E. A. Rollins, Commissioner; if yea, in what form were they issued? If only a portion thereof were so issued, designate the same, and state and set forth by whom and under what authority the remaining portions were issued.

"3. Whether or no any other rules, regulations, decisions, or orders for the purpose of carrying said acts of Congress into effect have been issued; and, if yea, state by whom, under what authority, to whom; and if printed copies thereof are within your control, attach the same to your answer; if not within your control, so state.

"4. Whether you believe said rules, regulations, decisions, and
27 orders, or any of them, have any binding force upon you; if yea, state or designate which you believe yourself bound to obey.

"5. Whether you believe the same to require obedience or acquiescence from rectifiers, distillers, tobacco manufacturers, compounders of liquors, makers of stills, or any and which of them.

"6. If to the 5th interrogatory you shall answer yea, state whether you intend or have intended to require such obedience or acquiescence, in what manner, and by what means.

"7. State and set forth fully what requirements are made by you touching meters, and state specially whether or not you do require distillers to purchase meters before permitting them to start their distilleries; if any are permitted to start before receiving such meters, state on what conditions they are permitted to start. State also particularly whether or no any sum of money or any other representative thereof is required from distillers to pay for Tice's meter, or any other meter; and, if so, what meter. Whether such meter is furnished to the distiller depositing, and by whom and from whom such meters are purchased.
28 State also whether or no there is any contract or agreement or understanding between the makers, vendors, or owners of said meters and said Rollins, or any other revenue officer, touching the furnishing of the same, or manufacture or sale of the same, and the whole of such contract, agreement, or understanding. State also, to the extent of your knowledge, information, and belief, whether said Rollins, or any other revenue officer, is in any manner interested in the ownership, manufacture, or sale of such meters, and whether or no he, or any other revenue officer, will or has in any manner got any gain from the furnishing or sale of such meters to distillers as aforesaid. If yea, what gain.

"8. Whether or no there are any officers of the revenue or any other persons who are in any manner authorized to carry said acts of Congress, or said rules, regulations, prescriptions, or opinions, or any or either of them, into effect, or to enforce the same, who are not under the supervision, direction, or control of said Rollins, Commissioner, &c. If yea, state and set forth who such persons are, and the nature and extent of their authority.

"9. Have you stated fully, fairly, and honestly your entire
29 knowledge of the subject-matter of the foregoing interrogatories?

"Lastly. If any matters there are known to you other than those set forth in your answers to the foregoing interrogatories which may tend to the advantage of either party to this suit, or will promote a just and equitable decision thereof, state them fully."

(NOTE.—The defendant E. A. Rollins is required to answer all the above interrogatories, and the defendants Allen and Ferguson are required to answer all said interrogatories except the 8th.)

To the end, therefore, that the complainant may have that relief which he only can obtain in a court of equity, and that his said lands and estate may be relieved from the incumbrance and cloud of the said acts of Congress, and that his person and liberty and property may be released from the duress and destruction of the said acts of Congress, and that the rules, regulations, prescriptions, and opinions of the said Commissioner, and that the said defendants may answer in the premises, and that the said defendants, and each and every one of them, viz,

Edward A. Rollins, Commissioner; W. B. Allen, collector; and
30 Duncan Fugason, assessor, their counsellors, attorneys, solicitors, officers, agents, successors in office, and all persons under the supervision, direction, or control of them, or either of them, may be restrained by injunction, issuing out of this court, from proceeding further against your orator, or in any manner attempting to carry said acts of Congress, or said rules, regulations, instructions, prescriptions, or opinions into effect, or to execute the same in any manner against your orator or his property, except to collect and receive from him the taxes and excises therein justly laid, or in any manner entering upon or intermeddling with any of your orator's property, his person, his servants, agents, or business connections:

And that the said acts of Congress may be declared null and void and of no effect, except the portions which lay taxes and excises, according to law, and those portions which repeal former statutes:

And that all of the said rules, regulations, opinions, prescriptions, and instructions of the said Commissioner be declared null and of no force or effect whatever:

And that your orator may have such further or other or differ-
31 ent relief in the premises as may be just and agreeable to equity:

May it please your honors to grant unto your orator writs of subpœna, to be directed to the said Edward A. Rollins, Commissioner; W. B. Allen, collector; and Duncan Furgason, assessor, thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

And, may it please your honors, that the district attorney of the United States for the northern district of Illinois, on being attended with a copy of this bill, may appear and put in answer thereto, and may stand to and abide such order, direction, and decree in the said premises as to your honors shall seem meet.

And, may it please your honors, further to grant unto your orator writs of injunction during the pendency of this suit, issuing out of and under

the seal of this honorable court, to be directed to the said Edward
32 A. Rollins, Commissioner; W. B. Allen, collector; and Duncan Furgason, assessor; their counsellors, attorneys, solicitors, officers, agents, successors in office, and all persons under the supervision, direc-

tion, or control of them, or either of them, commanding them and each of them absolutely to desist and refrain from, and also that they do prevent and forbid all persons under their direction, supervision, or control, from proceeding further against your orator, or in any manner attempting to carry said acts of Congress, or said rules, regulations, instructions, prescriptions, or opinions into effect; or to execute the same in any manner against your orator or his property, except to collect and receive from him the taxes and excises therein justly laid; or in any manner entering upon or intermeddling with any of your orator's property, his person, his servants, agents, or business connections, to his annoyance or damage; and that upon the final decree in this suit said injunction may be made perpetual.

And, may it please your honors, further upon such decree to declare all said acts of Congress, with the exception aforesaid, and all the
33 said rules, regulations, instructions, opinions, and prescriptions to be utterly null and void, and of no binding force or effect whatever.

And may your honors also grant unto your orator at all times during the pendency and on the decision hereof such other or further or different relief *and* may seem to your honors just and equitable.

And your orator will ever pray, &c.

LEMUEL W. MASON,
Complainant.

EDWARD ROBY,
Solicitor, 94 Washington street, rooms 32 & 33, Chicago, Ill.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Lemuel W. Mason, of Clintonville, in the county of Kane, and State of Illinois, being first duly sworn, upon his oath doth depose and say that he is the person named as orator or complainant in the foregoing bill of complaint, and that he hath subscribed the same; that he has heard the said bill of complaint read, and knows the contents thereof; and that the same is true of his own knowledge, except as to the
34 matters therein stated on his information and belief, and as to those matters he is informed and verily believes them to be true.

LEMUEL W. MASON.

Subscribed and sworn to before me this 7th day of November, A. D. 1868.

Attest my hand and seal of office.

[SEAL.] SIMEON W. KING,
United States Commissioner for the Northern District of the State of Illinois.

35 *Internal tax laws enacted since the compilation of* 1867.

AN ACT imposing taxes on distilled spirits and tobacco, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid, a tax of fifty cents on each and every proof-gallon, to be paid by the distiller, owner, or person having possession thereof before removal from distillery warehouse; and the tax on such spirits shall be collected on the whole number of gauge or wine gallons when below proof, and shall be increased in proportion for any greater strength than the strength of proof-spirit as defined in this act; and any fractional part of a gallon in excess of the number of gallons in a cask or package shall be taxed as a gallon. Every proprietor or possessor of a still, distillery, or distilling apparatus, and every person in any manner interested in the use of any such still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, and on the lot or tract of land whereon the said distillery is situated, together with any building thereon, from the time said spirits are distilled until the said tax shall be paid.

SEC. 2. *And be it further enacted*, That proof-spirit shall be held and taken to be that alcoholic liquor which contains one-half its volume of alcohol of a specific gravity of seven thousand nine hundred and thirty-nine ten-thousandths (.7939) at sixty degrees Fahrenheit; and the Commissioner of Internal Revenue, for the prevention and detection of frauds by distillers of spirits, is hereby authorized to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments, meters, or other means for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used or to be used in the production of distilled spirits, and the strength and quantity of spirits subject to tax, as he may deem necessary; and he may prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking, and gauging of spirits. And in all sales of spirits hereafter made, a gallon shall be taken to be a gallon of proof-spirit, according to the foregoing standard set forth and declared for the inspection and gauging of spirits throughout the United States. The tax on brandy made from grapes shall be the same and no higher than that upon other distilled spirits; and the Commissioner of Internal Revenue is hereby authorized, with the approval of the Secretary of the Treasury, to exempt distillers of brandy from apples, peaches, or grapes, exclusively, from such other of the provisions of this act relating to the manufacture of spirits as in his judgment may seem expedient.

36 SEC. 3. *And be it further enacted*, That whenever the Commissioner of Internal Revenue shall adopt and prescribe for use any meter, meters, or meter-safes, it shall be the duty of every owner, agent, or superintendent of a distillery to furnish and attach, at his own expense, such meter, meters, or meter-safes as may have been prescribed for use at his distillery, and to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment in accordance with the regulations of the Commissioner of Internal Revenue,

who is hereby further authorized to order and require such changes of or additions to distilling apparatus, connecting pipes, pumps, or cisterns, or any machinery connected with or used in or on the distillery premises, or may require to be put on any of the stills, tubs, cisterns, pipes, or other vessels, such fastenings, locks, or seals as he may deem necessary.

SEC. 4. *And be it further enacted*, That distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process; and no mash, wort, or wash fit for distillation or the production of spirits or alcohol shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person other than an authorized distiller shall by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol or any vapor of alcoholic spirits in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid. Any person who shall violate any of the provisions of this section shall be fined, for every offense, not less than five hundred dollars nor more than five thousand dollars, and imprisoned for not less than six months nor more than two years: *Provided*, That nothing in this section shall be construed to apply to fermented liquors.

SEC. 5. *And be it further enacted*, That every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the assistant assessor of the division in which said still or distilling apparatus shall be, by filing with him duplicate statements, in writing, subscribed by such person, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the assistant assessor, and the other transmitted to the assessor of the district. Stills and distilling apparatus now set up shall be so registered within sixty days from the time this act takes effect, and those hereafter set up shall be so registered immediately upon their being set up. Any still or distilling apparatus not so registered, together with all personal property in the possession, or custody, or under the control of such person and found in the building, or in any yard or inclosure connected with the building in which the same shall be set up, shall be forfeited. And any person having in his possession
37 or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of five hundred dollars, and on conviction shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned for not less than one month nor more than two years.

SEC. 6. *And be it further enacted*, That every person engaged in, or

intending to be engaged in, the business of a distiller or rectifier, shall give notice in writing, subscribed by him, to the assessor of the district within which such business is to be carried on, stating his name and place of residence, and if a company or firm, the name and place of residence of each member thereof, the place where said business is to be carried on, and whether of distilling or rectifying. And if such business be carried on in a city, the residence and place of business shall be indicated by the name of the street and number of the building. In case of a distiller, the notice shall also state the kind of stills, and the cubic contents thereof, the number and kind of boilers, the number of mash tubs and fermenting tubs, and the cubic contents of each tub, the number of receiving cisterns, and the cubic contents of each cistern, together with a particular description of the lot or tract of land on which the distillery is situated, with the size and description of the buildings thereon, and of what material constructed. The notice shall also state the number of hours in which the distiller will ferment each tub of mash or beer, the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, and the names and residence of every person interested or to be interested in the business, and that said distillery, and the premises connected therewith, are not within six hundred feet of any premises authorized to be used for rectifying or refining distilled spirits by any process. In case of a rectifier, the notice shall state the precise location of the premises where such business is to be carried on, the name and residence of every person interested, or to be interested, in the business, by what process the applicant intends to rectify, purify, or refine distilled spirits, the kind and cubic contents of any still used or to be used for such purpose, and the estimated quantity of spirits which can be rectified purified, or refined every twenty-four hours in such establishment, and that said rectifying establishment is not within six hundred feet of the premises of any distillery registered for the distillation of spirits. In case of any change in the location, form, capacity, ownership, agency, superintendency, or in the persons interested in the business of such distillery or rectifying establishment, or in the time of fermenting the mash or beer, notice thereof in writing shall be given to the said assessor or to the assistant assessor of the division within twenty-four hours of said change. And any assistant assessor receiving such notice shall immediately transmit the same to the assessor of the district. Every notice required by this section shall be in such form, and shall contain such additional particulars, as the Commissioner of Internal Revenue may from time to time prescribe. Any person failing or refusing to give such notice shall pay a penalty of one thousand dollars, and, on conviction, shall be fined not less than one hundred dollars nor more than two thousand dollars; and any person giving a false or fraudulent notice shall, on conviction, in addition to such penalty or fine, be imprisoned not less than six months nor more than two years.

SEC. 7. *And be it further enacted*, That every distiller shall, on filing his notice of intention to continue or commence business with the assessor, before proceeding with such business, after the passage of this act, and on the first day of May of each succeeding year, make and execute a bond in form prescribed by the Commissioner of Internal Revenue, with at least two sureties, to be approved by the assessor of the district. The penal sum of said bond shall not be less than double the amount of tax on the spirits that can be distilled in his distillery during a period of fifteen days; but in no case shall such bond be for a less sum than five thousand dollars. The condition of the bond

shall be that the principal shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, and will pay all penalties incurred or fines imposed on him for violation of any of the said provisions; that he will not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business. The assessor may refuse to approve said bond when, in his judgment, the situation of the distillery is such as would enable the distiller to defraud the United States; and in case of such refusal, the distiller may appeal to the Commissioner of Internal Revenue, whose decision in the matter shall be final. A new bond may be required in case of the death, insolvency, or removal of either of the sureties, and in any other contingency, at the discretion of the assessor or Commissioner of Internal Revenue. Any person failing or refusing to give the bond hereinbefore required, or to renew the same, or giving any false, forged, or fraudulent bond, shall forfeit the distillery, distilling apparatus, and all real estate and premises connected therewith, and, on conviction, shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

SEC. 8. *And be it further enacted*, That no bond of a distiller shall be approved unless he is the owner in fee, unencumbered by any mortgage, judgment, or other lien, of the lot or tract of land on which the distillery is situated, or unless he files with the assessor, in connection with his notice, the written consent of the owner of the fee, and of any mortgagee, judgment creditor, or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment, or other encumbrance, and that in case of the forfeiture of the distillery premises, or any part thereof, the title of the same shall vest in the United States discharged from any such mortgage, judgment, or other encumbrance. In any case where the owner of a distillery or distilling apparatus, erected prior to the passage of this act, has an estate for a term of years only, in a lot or tract of land on which the distillery is situated, the lease or other evidence of title to which shall have been duly recorded prior to the passage of this act, the value of such lot or tract of land, together with the building and distilling apparatus, shall be appraised in the manner to be prescribed by the Commissioner of Internal Revenue; and the assessor is hereby authorized to accept, in lieu of the said written consent of the owner of the fee, the bond of said distiller with not less than two sureties, who shall be residents of the collection district or county, or an adjoining county in the same State, in which the distillery is situated, and shall be the owners of unencumbered real estate in said district or county, or adjoining county, equal to such appraised value. The penal sum of said bond shall be equal to the appraised value of said lot or tract of land, together with the buildings and distilling apparatus, and such bond shall be conditioned that in case the distillery, distilling apparatus, or any part thereof, shall, by final judgment, be forfeited for the violation of any of the provisions of law, the obligors will pay the amount stated
39 in said bond. Said bond shall be in such form as the Commissioner of Internal Revenue shall prescribe.

SEC. 9. *And be it further enacted*, That every distiller and person intending to engage in the business of a distiller shall, previous to the

approval of his bond, cause to be made, under the direction of the assessor of the district, an accurate plan and description, in triplicate, of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, worm tub, and receiving cistern, the course and construction of all fixed pipes used or to be used in the distillery, and of every branch thereof, and of every cock or joint thereof, and of every valve therein, together with every place, vessel, tub, or utensil from and to which any such pipe shall lead, or with which it communicates. Such plan and description shall also show the number and location and cubic contents of every still, mash tub, and fermenting tub, together with the cubic contents of every receiving cistern, and the color of each fixed pipe, as required in this act. One copy of said plan and description shall be kept displayed in some conspicuous place in the distillery; two copies shall be furnished to the assessor of the district, one of which shall be kept by him and the other transmitted to the Commissioner of Internal Revenue. The accuracy of every such plan and description shall be verified by the assessor, the draughtsman, and the distiller; and no alteration shall be made in such distillery without the consent, in writing, of the assessor, which alteration shall be shown on the original or by a supplemental plan and description, and a reference thereto noted on the original, as the assessor may direct; and any supplemental plan and description shall be executed and preserved in the same manner as the original.

SEC. 10. *And be it further enacted*, That immediately after the passage of this act every assessor shall proceed, at the expense of the United States, with the aid of some competent and skillful person, to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered or intended to be registered for the production of spirits in his district, to estimate and determine its true producing capacity, and in like manner shall estimate and determine the capacity of any such distillery as may hereafter be so registered in said district, a written report of which shall be made in triplicate, signed by the assessor and the person aiding in making the same, one copy of which shall be furnished to the distiller, one retained by the assessor, and the other immediately transmitted to the Commissioner of Internal Revenue. If the Commissioner of Internal Revenue shall at any time be satisfied that such report of the capacity of a distillery is in any respect incorrect or needs revision, he shall direct the assessor to make in like manner another survey of said distillery; the report of said survey shall be executed in triplicate and deposited as hereinbefore provided.

SEC. 11. *And be it further enacted*, That after the passage of this act it shall not be lawful for any assessor to assess a special tax upon any distiller, or for the collector to collect the same, or for any distiller who has heretofore paid a special tax as such to continue the business of distilling until such distiller shall have given the bond required by this act, and shall have complied with the provisions of law having reference to the registration and survey of distilleries, and having reference to the arrangement and construction of distilleries, and the premises connected therewith, in manner and as required by this act; nor shall it be lawful for any assessor of internal revenue to assess, or for any collector to collect, any special tax for distilling on any premises distant less than six hundred feet from any premises used for rectifying, nor shall any assessor assess or collector collect any special tax for rectifying distilled spirits on any premises distant less than six hundred feet from any distillery when the distillery and rectifying establishments are

occupied and used by different persons; nor shall the process of distillation and rectification both be carried on within the distance of six hundred feet. In all cases where a distillery and rectifying establishment, distant the one from the other less than six hundred feet, are occupied and used by the same person, said person shall have the right to elect which business shall be discontinued at that place. In all cases where rectifying or distilling shall be discontinued under the provisions of this section, and the time for which the special tax for rectifying or distilling was paid remains unexpired, the Secretary of the Treasury is hereby authorized to refund out of any money in the Treasury not otherwise appropriated, on requisition of the Commissioner of Internal Revenue, a proportionate part of any sum originally paid for special tax therefor, which shall be in such ratio to the whole sum paid as the unexpired time for which special tax was paid shall bear to the whole term for which the same was paid. Any collector or assessor of internal revenue who shall fail to perform any duty imposed by this section, or shall assess or collect any special tax in violation of its provisions, shall be liable to a penalty of five thousand dollars for each offense.

SEC. 12. *And be it further enacted*, That no person shall use any still, boiler, or other vessel for the purpose of distilling in any dwelling-house, nor in any shed, yard, or inclosure connected with any dwelling-house, nor on board of any vessel or boat, nor in any building, or on any premises where beer, lager-beer, ale, porter, or other fermented liquors, vinegar or ether, are manufactured or produced, or where sugars or sirups are refined, or where liquors of any description are retailed, or where any other business is carried on, nor within six hundred feet from any premises authorized to be used for rectifying; and every person who shall use any still, boiler, or other vessel for the purpose of distilling, as aforesaid, in any building or other premises where the above-specified articles are manufactured, produced, refined, or retailed, or other business is carried on, or on board of any vessel or boat, or in any dwelling-house, or other place, as aforesaid, or shall aid or assist therein, or who shall cause or procure the same to be done, shall, on conviction, be fined one thousand dollars and imprisoned for not less than six months nor more than two years, in the discretion of the court: *Provided*, That saleratus may be manufactured, or meal or flour ground from grain, in any building or on any premises where spirits are distilled; but such meal or flour only to be used for distillation on the premises.

SEC. 13. *And be it further enacted*, That there shall be assessed and collected monthly, from every authorized distiller whose distillery has an aggregate capacity for mashing and fermenting twenty bushels of grain or less, or sixty gallons of molasses or less, in twenty-four hours, a tax of two dollars per day, Sundays excepted; and a tax of two dollars per day for every twenty bushels of grain or sixty gallons of molasses of said capacity in excess of twenty bushels of grain or sixty gallons of molasses in twenty-four hours. But any distiller who shall suspend work, as provided by this act, shall pay only two dollars per day during the time the work shall be so suspended in his distillery.

SEC. 14. *And be it further enacted*, That any person who shall manufacture any still, boiler, or other vessel, to be used for the purpose of distilling, shall, before the same is removed from the place of manufacture, notify in writing the assessor of the district in which such still, boiler, or other vessel is to be used or set up, by whom it is to be
41 used, its capacity, and the time when the same is to be removed from the place of manufacture; and no such still, boiler, or other

vessel shall be set up without the permit, in writing, of the said assessor for that purpose; and any person who shall set up any such still, boiler, or other vessel, without first obtaining a permit from the said assessor of the district in which such still, boiler, or other vessel is intended to be used, or who shall fail to give such notice, shall pay in either case the sum of five hundred dollars, and shall forfeit the distilling apparatus thus removed or set up in violation of law.

SEC. 15. *And be it further enacted*, That every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, to be used only for the storage of distilled spirits, of his own manufacture; but no dwelling-house shall be used for such purpose; and no door, window, or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper assigned thereto by the Commissioner of Internal Revenue; and the tax on the spirits stored in such warehouse shall be paid before removal from such warehouse.

SEC. 16. *And be it further enacted*, That the owner, agent, or superintendent of any distillery, established as hereinbefore provided, shall erect, in a room or building to be provided and used for that purpose, and for no other, and to be constructed in the manner to be prescribed by the Commissioner of Internal Revenue, two or more receiving cisterns, each to be at least of sufficient capacity to hold all the spirits distilled during the day of twenty-four hours, into which shall be conveyed all the spirits produced in said distillery; and each of such cisterns shall be so constructed as to leave an open space of at least three feet between the top thereof and the floor or roof above, and of not less than eighteen inches between the bottom thereof and the floor below, and shall be so situated that the officer can pass around the same, and shall be connected with the outlet of the worm or condenser by suitable pipes or other apparatus so constructed as always to be exposed to the view of the officer, and so connected and constructed as to prevent the abstraction of spirits while passing from the outlet of the worm or condenser back to the still or doubler, or forward to the receiving cistern; such cisterns, and the room in which they are contained, shall be in charge of and under the lock and seal of the internal revenue gauger designated for that duty; and on the third day after the spirits are conveyed into such cisterns, the same shall be drawn off into casks under the supervision of such gauger, in the presence of the storekeeper, and be removed directly to the distillery warehouse; and on special application to the assessor or assistant assessor by the owner, agent, or superintendent of any distillery, the spirits may be drawn off from the said cisterns under the supervision of the gauger at any time previous to the third day. All locks and seals required by law shall be provided by the Commissioner of Internal Revenue at the expense of the owner of the distillery or warehouse; and the keys shall be in charge of the collector or such gauger as he may designate.

SEC. 17. *And be it further enacted*, That the door of the furnace of every still or boiler used in any distillery shall be so constructed that it may be securely fastened and locked. The fermenting tubs shall
42 be so placed as to be easily accessible to any revenue officer, and

each tub shall have distinctly painted thereon in oil colors its cubic contents in gallons, and the number of the tub. There shall be a clear space of not less than one foot around every wood still, and not less than two feet around every doubler and worm tank. The doubler and worm tanks shall be elevated not less than one foot from the floor; and every fixed pipe to be used by the distiller, except for conveyance of water, or of spent mash or beer only, shall be so fixed and placed as to be capable of being examined by the officer for the whole of its length or course, and shall be painted, and kept painted, as follows, that is to say: Every pipe for the conveyance of mash or beer shall be painted of a red color; every pipe for the conveyance of low wines back into the still or doubler shall be painted blue; every pipe for the conveyance of spirits shall be painted black; and every pipe for the conveyance of water shall be painted white. If any fixed pipe shall be used by any distiller which shall not be painted or kept painted, as herein directed, or which shall be painted otherwise than as herein directed, he shall forfeit the sum of one thousand dollars. No assessor shall approve the bond of any distiller until all the requirements of the law and all regulations made by the Commissioner of Internal Revenue in relation to distilleries, in pursuance thereof, shall have been complied with. Any assessor who shall violate the provisions of this section shall forfeit and pay two thousand dollars, and shall be dismissed from office.

SEC. 18. *And be it further enacted*, That every person engaged in distilling or rectifying spirits, and every wholesale liquor-dealer and compounder of liquors, shall place and keep conspicuously on the outside of his distillery, rectifying establishment, or place of business, a sign in plain and legible letters, not less than three inches in length, painted in oil colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier, wholesale dealer, or compounder, with the words: "Registered distillery," "rectifier of spirits," "wholesale liquor dealer," or "compounder of liquors," as the case may be; and no fence or wall of a height greater than five feet shall be erected or maintained around the premises of any distillery, so as to prevent easy and immediate access to said distillery; and every distiller shall furnish to the assessor of the district as many keys of the gates and doors of the distillery as may be required by the assessor, from time to time, for any revenue officer or other person who may be authorized to make survey or inspections of the premises, or of the contents thereof; and said distillery shall be kept always accessible to any officer or other person having any such key. Any person who shall violate any of the foregoing provisions of this section by negligence or refusal, or otherwise, shall pay a penalty of five hundred dollars. Any person not having paid the special tax, as required by law, who shall put up the sign required by this section, or any sign indicating that he may lawfully carry on the business of a distiller, rectifier, wholesale liquor-dealer, or compounder of liquors, shall forfeit and pay one thousand dollars, and, on conviction, shall be imprisoned not less than one month nor more than six months; and any person who shall work in any distillery, rectifying establishment, wholesale liquor-store, or in the store of any compounder of liquors, on which no sign shall be placed and kept as hereinbefore provided, and any person who shall knowingly receive at, carry or convey any distilled spirits to or from any such distillery, rectifying establishment, warehouse, or store, or who shall knowingly carry and deliver any grain, molasses, or other raw material to any distillery on which such sign shall not be placed and kept, shall forfeit all horses,

43 carts, drays, wagons, or other vehicle or animal used in carrying or conveying of such property aforesaid, and, on conviction, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than six months.

SEC. 19. *And be it further enacted*, That every person making or distilling spirits, or owning any still, boiler, or other vessel used for the purpose of distilling spirits, or having such still, boiler, or other vessel so used under his superintendence, either as agent or owner, or using any such still, boiler, or other vessel, shall, from day to day, make, or cause to be made, true and exact entry in a book or books, to be kept by him, in such form as the Commissioner of Internal Revenue may prescribe, of the kind of materials, and the quantity in pounds, bushels, or gallons purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered at said distillery, together with the amount paid *for* therefor, the kind and quantity of fuel purchased for use in the distillery, and from whom purchased, the amount paid for ice or water for use in the distillery, the repairs placed on said distillery or distilling apparatus, the cost thereof, and by whom and when made, and [of] the name and residence of each person employed in or about the distillery, and in what capacity employed; and in another book shall make like entry [of] the quantity of grain or other material used for the production of spirits, the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermentation, the quantity of mash in each tub, designating the same by the number of the tub, the number of dry inches, that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting, the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity, and temperature at the hour of twelve meridian; also the time when any fermenting tub is emptied of ripe mash or beer, the number of gallons of spirits distilled, the number of gallons placed in warehouse, and the proof thereof, and the number of gallons sold or removed, with the proof thereof, and the name, place of business, and residence of the person to whom sold; and every fermenting tub shall be emptied at the end of the fermenting period, and shall remain empty for a period of twenty-four hours. On the first, eleventh, and twenty-first days of each month, or within five days thereafter, respectively, every distiller shall render to the assistant assessor an account in duplicate, taken from his books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine-gallons and of proof-gallons of spirits produced and placed in warehouse; and the distiller or the principal manager of the distillery shall make and subscribe the following oath, to be attached to said return:

"I, —— ——, distiller, (or principal manager, as the case may be,) of the distillery at ———, do solemnly swear that, since the date of the last return of the business of said distillery, dated —— day of —— to —— day of ——, both inclusive, there was produced in said distillery, and withdrawn and placed in warehouse, the number of wine-gallons and proof-gallons of spirits, and there were actually mashed and used in said distillery, and consumed in the production of spirits therein, the several *quantites* of grain, sugar, molasses, and other materials, respectively, hereinbefore specified, and no more."

The said book shall always be kept at the distillery, and be always open to the inspection of any revenue officer, and, when filled up, shall be preserved by the distiller for a period not less than two years there-

after, and, whenever required, shall be produced for the inspec-
44 tion of any revenue officer. If any false entry shall be made in either of said books, or any entry required to be made therein shall be omitted therefrom, for every such false entry made, or omission, the distiller shall forfeit and pay a penalty of one thousand dollars. And if any such false entry shall be made, or any entry shall be omitted therefrom, with intent to defraud or to conceal from the revenue officers any fact or particular required to be stated and entered in either of said books, or to mislead in reference thereto, or if any distiller, as aforesaid, shall omit or refuse to provide either of said books, or shall cancel, obliterate, or destroy any part of either of such books, or any entry therein, with intent to defraud, or shall permit the same to be done, or such books, or either of them, be not produced when required by any revenue officer, the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property of every kind and description on said premises used in the business there carried on, shall be forfeited to the United States. And any person making such false entry or omitting to make any entry hereinbefore required to be made, with the intent aforesaid, or who shall cause or procure the same to be done, or who shall fraudulently cancel, obliterate, or destroy any part of said books, or any entry therein, or who shall willfully fail to produce such books, or either of them, on conviction, shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

SEC. 20. *And be it further enacted*, That on receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency at the rate of fifty cents for every proof-gallon, together with the special tax of four dollars for every cask of forty proof-gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery, as estimated under the provisions of this act.

SEC. 21. *And be it further enacted*, That the storekeeper assigned to any distillery warehouse shall also have charge of the distillery connected therewith, and, in addition to the duties required of him as a storekeeper in charge of a warehouse, shall keep in a book to be provided for that purpose, and in the manner to be prescribed by the Commissioner of Internal Revenue, a daily account of all the meal and vegetable productions or other substances brought into said distillery, or on said premises, to be used for the purpose of producing spirits, from whom purchased, and when delivered at said distillery, the kind and quantity of all fuel used, and from whom purchased, and of all repairs made on said distillery, and by whom and when made, the names and places of residence of all persons employed in or about the distillery, of the materials put into the mash tub, or otherwise used for the production of

spirits, the time when any fermenting tub is emptied of ripe mash
45 or beer, recording the same by the number painted on said tub, and of all spirits drawn off from the receiving cistern, and the time when the same were drawn off. Any distiller or person employed in any distillery who shall use, cause, or permit to be used any material for the purpose of making mash, wort, or beer, or for the production of spirits, or shall remove any spirits in the absence of the storekeeper or persons designated to act as said storekeeper, shall forfeit and pay double the amount of taxes on the spirits so produced, distilled, or removed, and, in addition thereto, be liable to a penalty of one thousand dollars.

SEC. 22. *And be it further enacted*, That every distiller, at the hour of twelve meridian, on the third day after that on which his bond shall have been approved by the assessor, shall be deemed to have commenced and thereafter to be continuously engaged in the production of distilled spirits in his distillery, except in the intervals when he shall have suspended work, as hereinafter authorized or provided. Any distiller desiring to suspend work in his distillery may give notice in writing to the assistant assessor of his division, stating when he will suspend work; and on the day mentioned in said notice, said assistant assessor shall, at the expense of the distiller, proceed to fasten securely the door of every furnace of every still or boiler in said distillery, by locks and otherwise, and shall adopt such other means as the Commissioner of *the* Internal Revenue shall prescribe to prevent the lighting of any fire in such furnace, or under such stills or boilers. The locks and seals and other materials required for such purpose shall be furnished to the assessor of the district by the Commissioner of Internal Revenue, to be duly accounted for by said assessor. Such notice by any distiller, and the action taken by the assistant assessor in pursuance thereof, shall be immediately reported to the assessor of the district, and by him transmitted to the Commissioner of Internal Revenue. No distiller, after having given such notice, shall, after the time stated therein, carry on the business of a distiller on said premises until he shall have given another notice in writing to said assessor, stating the time when he will resume work; and at the time so stated for resuming work, the assistant assessor shall attend at the distillery to remove said locks and other fastenings; and thereupon, and not before, work may be resumed in said distillery, which fact shall be immediately reported to the assessor of the district, and by him transmitted to the Commissioner of Internal Revenue. Any distiller, after the time fixed in said notice declaring his intention to suspend work, who shall carry on the business of a distiller on said premises, or shall have mash, wort, or beer in his distillery, or on any premises connected therewith, or who shall have in his possession or under his control any mash, wort, or beer, with intent to distil the same on said premises, shall incur the forfeitures and be subject to the same punishment as provided for persons who carry on the business of a distiller without having paid the special tax.

SEC. 23. *And be it further enacted*, That all distilled spirits shall be drawn from the receiving cisterns into casks, each of not less capacity than twenty gallons wine measure, and shall thereupon be gauged, proved, and marked by an internal revenue gauger, by cutting on the cask containing such spirits, in a manner to be prescribed by the Commissioner of Internal Revenue, the quantity, in wine-gallons and in proof-gallons, of the contents of such cask, and shall be immediately removed into the distillery warehouse, and the gauger shall, in presence of the storekeeper of the warehouse, place upon the head of the cask an engraved stamp, which shall be signed by the collector of the district

and the storekeeper and gauger, and shall have written thereon the
46 number of proof-gallons contained therein, the name of the distiller, the date of the receipt in the warehouse, and the serial number of each cask, in progressive order, as the same shall be received from the distillery. Such serial number for every distillery shall begin with number one (No. 1) with the first cask deposited therein after this act takes effect, and no two or more casks warehoused at the same distillery shall be marked with the same number. The said stamp shall be as follows:

Distillery warehouse stamp No. ——.

Issued by ——— ———, collector, ——— district, State of———. Distillery warehouse of ———, 18—. Cask No. — —, contents, ——— gallons, proof-spirit.

———— ————,
United States Storekeeper.

Attest:

———— ————,
United States Gauger.

And the distiller or owner of all spirits so removed to the distillery warehouse shall, on the first, eleventh, and twenty-first days of each month, or within five days thereafter, enter the same for deposit in such warehouse, under such rules and regulations, not inconsistent herewith, as the Commissioner of Internal Revenue may prescribe; and said entry shall be in triplicate, and shall contain the name of the person making the entry, the designation of the warehouse in which the deposit is made, and the date thereof, and [shall] be in form as follows:

Entry for deposit in distillery warehouse.

Entry of distilled spirits deposited by——— ———, in distillery warehouse ———, in the ——— district, State of ———, on the ——— day of ———, anno Domini ——.

And the entry shall specify the kind of spirits, the whole number of casks, the marks and serial numbers thereon, the number of gauge or wine gallons, and of proof-gallons, and the amount of the tax on the spirits contained in them; all of which shall be verified by the oath or affirmation of the distiller or owner of the same attached to the entry; and the said distiller or owner shall give his bond in duplicate, with one or more sureties satisfactory to the collector of the district, conditioned that the principal named in said bond will pay the tax on the spirits, as specified in the entry, or cause the same to be paid, before removal from said distillery warehouse, and within one year from the date of said bond; and the penal sum of such bond shall not be less than double the amount of the tax on such distilled spirits. One of said entries shall be retained in the office of the collector of the district, one sent to the storekeeper in charge of the warehouse to be retained and filed in the warehouse, and one sent with the duplicate of the bond to the Commissioner of Internal Revenue, to be filed in his office.

SEC. 24. *And be it further enacted*, That any distilled spirits may, on payment of the tax thereon, be withdrawn from warehouse on application to the collector of the district in charge of such warehouse, on making a withdrawal entry, in duplicate and in form as follows:

Entry for withdrawal of distilled spirits from warehouse. Tax paid.

Entry of distilled spirits to be withdrawn, on payment of the tax, from

—— warehouse, by —— ——, deposited on the —— day of ——, anno Domini ——, by —— ——, in said warehouse.

47 And the entry shall specify the whole number of casks, with the marks and serial numbers thereon, the number of gauge or wine gallons, and of proof-gallons, and the amount of the tax on the distilled spirits contained in them; all of which shall be verified by the oath or affirmation of the person making such entry; and on payment of the tax the collector shall issue his order to the storekeeper in charge of the warehouse for the delivery. One of said entries shall be filed in the office of the collector, and the other transmitted by him to the Commissioner of Internal Revenue.

SEC. 25. *And be it further enacted*, That whenever an order is received from the collector for the removal from any distillery warehouse of any cask of distilled spirits, on which tax has been paid, it shall be the duty of the gauger by whom the same is gauged and inspected, in presence of the storekeeper, before such cask has left the warehouse, to place upon the head thereof, in such manner as to cover no portion of any brand or mark prescribed by law already placed thereon, a stamp, on which shall be engraved the number of proof-gallons contained in said cask on which the tax has been paid, and which shall be signed by the collector of the district, storekeeper, and gauger, and which shall state the serial number of the cask, the name of the person by whom the tax was paid, and the person to whom and the place where it is to be delivered; which stamp shall be as follows:

Tax-paid stamp No. ——.

Received ——— ———, 18—, from ——— ———, tax on —— gallons proof-spirit, cask No. —, ——— warehouse, at ——, for delivery to ——— at ———.

——— ———,
Collector —— District, State of——.

Attest:

——— ———,
U. S. Storekeeper.

——— ———,
U. S. Gauger.

And at the time of affixing the tax-paid stamp or stamps, the gauger shall, in the presence of the storekeeper, cut or burn upon each cask the name of the distiller, the district, the date of the payment of [the] tax, the number of proof-gallons, and the number of the stamp, which cutting or burning shall be erased when such cask is emptied, by cutting or burning a canceling line across such marks or brands. Whenever any cask or package of rectified spirits shall be filled for shipment, sale, or delivery, on the premises of any rectifier, who shall have paid the special tax required by law, it shall be the duty of a United States gauger to gauge and inspect the same and place thereon an engraved stamp, which shall be signed by the collector of the district and the said gauger, and state the date when affixed, and the number of proof-gallons, which stamp shall be as follows:

Stamp for rectified spirits No. ——.

Issued by ——— ———, collector, —— district, State of ———.
——— ———, rectifier of spirits in the —— district, State of ———, ——— ———, 18—. —— proof-gallons.

——— ———,
U. S. Gauger.

Whenever any cask or package of distilled spirits shall be filled for shipment, sale, or delivery on the premises of any wholesale liquor
48 dealer or compounder, it shall be the duty of a United States gauger to gauge and inspect the same, and place thereon an engraved stamp, signed by the collector of the district and the said gauger, stating the name of the compounder or dealer, and the date when affixed, and the number of proof-gallons; which stamp shall be as follows:

Wholesale liquor-dealer's stamp No. ——.

Issued by ——— ———, collector —— district, State of ———.
——— ———, wholesale liquor-dealer, of ———, —— district, State of ———, ——— ———, 18—. —— proof-gallons.

——— ———,
U. S. Gauger, —— District, State of ———.

All blanks in any of the above forms shall be duly filled in accordance with the facts in each case. And the stamps above designated shall be affixed so as to fasten the same securely to the cask or package and duly canceled, and shall then be immediately covered with a coating of transparent varnish or other substance, so as to protect them from removal or damage by exposure; and such affixing, cancellation, and covering shall be done in such manner as the Commissioner of Internal Revenue shall by regulation prescribe; but such stamps shall in every case be affixed to a smooth surface of the cask or other package, which surface shall not have been previously painted or covered with any substance.

SEC. 26. *And be it further enacted*, That all stamps required for distilled spirits shall be engraved in their several kinds in book-form, and shall be issued by the Commissioner of Internal Revenue to any collector, upon his requisition, in such numbers as may be necessary in the several districts. Each stamp shall have an engraved stub attached thereto, with a number thereon corresponding with an engraved number on the stamp, and the stub shall not be removed from the book. And there shall be entered on the corresponding stub such memoranda of the contents of every stamp as shall be necessary to preserve a perfect record of the use of such stamp when detached.

SEC. 27. *And be it further enacted*, That every stamp for the payment of tax on distilled spirits shall have engraved thereon words and figures representing a decimal number of gallons, and a similar number of gallons shall be engraved on the stub corresponding to such stamp, and between the stamp and the stub and connecting them shall be engraved nine coupons, which, beginning next to the stamp, shall indicate in succession the several numbers of gallons between the number named in the stamp and the decimal number next above. And whenever any collector shall receive the tax on the distilled spirits contained in any cask, he shall detach from the book a stamp representing the denominate quantity nearest to the quantity of proof-spirits in such cask, as shown by the gauger's return, with such number of the coupons attached thereto as shall be necessary to make up the whole number of proof-gallons in said cask, and any quantity in addition to the number of full gallons less than one gallon shall be regarded as a full gallon; and all unused coupons shall remain attached to the marginal stub; and no coupon shall have any value or significance whatever when detached from the stamp and stub. And the tax-paid stamps with the coupons may denote such number of gallons, not less than twenty, as the Commissioner of Internal Revenue may deem advisable.

SEC. 28. *And be it further enacted*, That the books of tax-paid stamps issued to any collector shall be charged to his account at the full
49 value of the tax on the number of gallons represented on the stamps and coupons contained in said books; and every collector shall make a monthly return to the Commissioner of Internal Revenue of all tax-paid stamps issued by him to be affixed to any cask or package containing distilled spirits, on which the tax has been paid, and account for the amount of the tax collected; and when the said collector shall return to the Commissioner of Internal Revenue any book of marginal stubs, which it shall be his duty to do as soon as all the stamps contained in the book, when issued to him from the office of internal revenue, have been used, and shall have accounted for the tax on the number of gallons represented on the stamps and coupons that were contained in said book, there shall be allowed a commission of half of one per centum on the amount of the tax on spirits distilled after the passage of this act, in addition to any other commission by law allowed, which shall be equally divided between the collector receiving the tax and the assessor of the district in which the distilled spirits were produced. All stamps relating to distilled spirits other than the tax-paid stamps shall be charged to collectors as representing the value of twenty-five cents for each stamp; and the books containing such stamps may be intrusted by any collector to the gauger of the district, who shall make a daily report to the assessor and collector of all such stamps used by him, and for whom used, and from these reports the assessor of the district shall assess the person for whom they were used, and the collector shall thereupon collect the amount due for such stamps at the rate of twenty-five cents for each stamp issued during the month; and when all the stamps contained in any such book shall have been issued the gauger of the district shall return the book to the collector with all the marginal stubs therein.

SEC. 29. *And be it further enacted*, That any revenue officer who shall affix or cancel, or cause or permit to be affixed or canceled, any stamp relating to distilled spirit required or provided for in this act in any other manner or in any other place, or who shall issue the same to any other person than as provided by law, or regulation made in pursuance thereof, or who shall knowingly affix or permit to be affixed any such stamp to any cask or package of spirits of which the whole or any part has been distilled, rectified, compounded, removed, or sold, in violation of law, or which has in any manner escaped payment of tax due thereon, shall, for every such offense, be fined not less than five hundred dollars nor more than three thousand dollars, and be imprisoned for not less than six months nor more than three years.

SEC. 30. *And be it further enacted*, That if any distiller shall desire to reduce the producing capacity of his distillery, he shall give notice of such intention in writing to said assessor, stating the quantity of spirits which he desires thereafter to manufacture or produce every twenty-four hours, and thereupon said assessor shall proceed, at the expense of the distiller, to reduce and limit the producing capacity of the distillery to the quantity stated in said notice, by placing upon a sufficient number of the fermenting tubs close-fitting covers, which shall be securely fastened by nails, seals, and otherwise, and in such manner as to prevent the use of such tubs without removing said covers or breaking said seals, and shall adopt such other precautions as shall be prescribed by the Commissioner of Internal Revenue to reduce the capacity of said distillery. And any person who shall break, injure, or in any manner tamper with any lock, seal, or other fastening applied to any furnace, still, or

fermenting-tub, or other vessel, in pursuance of the provisions of this act, or who shall open or attempt to open any door, tub, or other vessel which shall have been locked or sealed, or otherwise closed or fastened as herein provided, or who shall use any furnace, still, or fermenting-tub, or other vessel which shall be so locked, sealed or fastened, shall be deemed guilty of a felony, and, on conviction, shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned for not less than one year nor more than three years.

SEC. 31. *And be it further enacted*, That whenever any officer shall require that the water contained in any worm-tub in a distillery, at any time when the still shall not be at work, shall be drawn off, and the tub and worm cleansed, the water shall forthwith be drawn off, and the tub and worm cleansed by the distiller or his workmen accordingly; and the water shall be kept and continued out of such worm-tub for the space of two hours, or until the officer has finished his examination thereof; and for any refusal or neglect to comply with the requisition of the officer in this behalf, or the provision in this clause contained, the distiller shall forfeit the sum of one thousand dollars, and it shall be lawful for the officer to draw off such water, or any portion of it, and to keep the same drawn off for so long a time as he shall think necessary.

SEC. 32. *And be it further enacted*, That it shall be lawful for any revenue officer, at all times, as well by night as by day, to enter into any distillery, or building or place used for the business of distilling, or in connection therewith, for storage or other purposes, and to examine, gauge, measure, and take an account of every still or other vessel or utensil of any kind, and of all low wines, and of the quantity and gravity of all mash, wort, or beer, and of all yeast, or other compositions for exciting or producing fermentation in any mash or beer, and of all spirits, and of all materials for making or distilling spirits, which shall be in any such distillery or premises, or in the possession of the distiller; and if any revenue officer, or any person called by him to his aid, shall be hindered, obstructed, or prevented by any distiller or by any workman, or other person acting for such distiller or in his employ from entering into any such distillery or building or place as aforesaid, or if any such officer shall be by the distiller, or his workman, or any person in his employ, prevented or hindered from, or opposed, or obstructed, or molested in the performance of his duty under this act, in any respect, the distiller shall forfeit the sum of one thousand dollars. If any officer, having demanded admittance into a distillery or premises of a distillery, and having declared his name and office, shall not be admitted into such distillery or premises by the distiller or other person having charge of the same, it shall be lawful for such officer, at all times, as well by night as by day, to break open by force any of the doors or windows, or to break through any of the walls of such distillery or premises necessary to be broken open or through, to enable him to enter the said distillery or premises; and the distiller shall forfeit the sum of one thousand dollars.

SEC. 33. *And be it further enacted*, That on the demand of any revenue officer, every distiller, rectifier, or compounder of spirits shall furnish strong, safe, and convenient ladders of sufficient length to enable the officer to examine and gauge any vessel or utensil in such distillery or premises, and shall, at all times when required, supply all assistance, lights, ladders, tools, staging, or other things necessary for inspecting the premises, stock, tools, and apparatus belonging to such person, and shall open all doors, and open for examination all boxes, packages, and

all casks, barrels, and other vessels not under the control of a revenue officer in charge, under a penalty of five hundred dollars for every refusal or neglect so to do.

SEC. 34. *And be it further enacted*, That it shall be lawful for
51 any revenue officer, and any person acting in his aid, to break up the ground on any part of the distillery or premises of a distiller, rectifier, or compounder of liquors, or any ground adjoining or near to such distillery or premises, or any wall or partition thereof, or belonging thereto, or other place, to search for any pipe, cock, private conveyance, or utensil; and upon finding any such pipe or conveyance leading therefrom or thereto, he may break up any ground, house, wall, or other place through or into which such pipe or other conveyance shall lead, and break or cut away such pipe or other conveyance, and turn any cock, or examine whether such pipe or other conveyance may convey or conceal any mash, wort, or beer, or other liquor which may be used for distillation of low wines or spirits from the sight or view of the officer, so as to prevent or hinder him from taking a true account thereof.

SEC. 35. *And be it further enacted*, That no malt, corn, grain, or other material shall be mashed, nor any wash, wort, or beer brewed or made, nor any still used by a distiller at any time between the hour of eleven in the afternoon of any Saturday and the hour of one in the forenoon of the next succeeding Monday; and any person who shall violate the provisions of this section shall be liable to a penalty of one thousand dollars.

SEC. 36. *And be it further enacted*, That all distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States. And in case of the seizure of any distilled spirits found elsewhere than in a distillery, distillery warehouse, or other warehouse for distilled spirits authorized by law, or in the store or place of business of a rectifier, or of a wholesale liquor-dealer, or of a compounder of liquors, or in transit from any one of said places; and in case of the seizure of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which shall not have been received into or sent out therefrom in conformity to law, or in regard to which any of the entries required by law to be made in the books of the owner of such spirits or of the storekeeper, wholesale dealer, rectifier, or compounder, have not been made at the time or in the manner required, or in respect to which the owner or person having possession, control, or charge of said spirits shall have omitted to do any act required to be done, or shall have done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with. And any person who shall remove, or shall aid or abet in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or who shall conceal or aid in the concealment of any spirits so removed, or who shall remove or shall aid or abet in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or who shall conceal, or aid in the concealment of any spirits so removed, shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall, on conviction, be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

SEC. 37. *And be it further enacted*, That no person shall remove any distilled spirits at any other time than after sun-rising and before sun-setting, in any cask or package containing more than ten gallons, from any premises or building in which the same may have been distilled,
52 redistilled, rectified, compounded, manufactured, or stored, and every person who shall violate this provision shall be liable to a penalty of one hundred dollars for each cask, barrel, or package of spirits so removed; and said spirits, together with any vessel containing the same, and any horse, cart, boat, or other conveyance used in the removal thereof, shall be forfeited to the United States.

SEC. 38. *And be it further enacted*, That any person who shall add or cause to be added any ingredient or substance to any distilled spirits, before the tax imposed by law shall have been paid thereon, for the purpose of creating a fictitious proof, shall, on conviction, be fined not less than one hundred dollars nor more than one thousand dollars for each cask or package so adulterated, and imprisoned not less than three months nor more than two years, and every such cask or package, with its contents, shall be forfeited to the United States.

SEC. 39. *And be it further enacted*, That any person who shall evade or attempt to evade the payment of the tax on any distilled spirits, in any manner whatever, shall forfeit and pay double the amount of the tax so evaded or attempted to be evaded; and any person who shall change or alter any stamp, mark, or brand on any cask or package containing distilled spirits, or who shall put into any cask or package spirits of greater strength than is indicated by the inspection mark thereon, or who shall fraudulently use any cask or package having any inspection mark or stamp thereon, for the purpose of selling other spirits or spirits of quantity or quality different from the spirits previously inspected therein, shall forfeit and pay the sum of two hundred dollars for every cask or package on which the stamp or mark is so changed or altered or which is so fraudulently used, and, on conviction, shall be fined for each such offense not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than one month nor more than one year.

SEC. 40. *And be it further enacted*, That any person who shall knowingly use any false weights or measures in ascertaining, weighing, or measuring the quantities of grain, meal, or vegetable materials, molasses, beer, or other substances to be used for distillation, or who shall destroy, break, injure, or tamper with any lock or seal which may be placed on any cistern-room or building, by the duly authorized officers of the revenue, or shall open said lock or seal, or the door to such cistern-room or building, or shall in any manner gain access to the contents therein in the absence of the proper officer, shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than one year nor more than three years; and any person who shall use any molasses, beer, or other substance, whether fermented on the premises or elsewhere, for the purpose of producing spirits, before an account for the same shall have been registered in the proper record-book provided for that purpose, shall forfeit and pay the sum of one thousand dollars for each and every offense so committed.

SEC. 41. *And be it further enacted*, That it shall be lawful for any internal revenue officer to detain any cask or package containing, or supposed to contain, distilled spirits, when such officer has reason to believe the tax imposed by law upon the same has not been paid, or that the same is being removed in violation of law; and every such cask or package

may be held by such officer at a safe place until it shall be determined whether the property so detained is liable by law to be proceeded against for forfeiture; but such summary detention shall not continue in any case longer than forty-eight hours, without process of law or intervention of the officer to whom such detention is to be reported.

53 SEC. 42. *And be it further enacted*, That no distillery nor distilling apparatus seized for any violation of law shall be released to the claimant or any intervening party before judgment, except in case of a distillery for which the special tax has been paid, and which has a registered producing capacity of one hundred and fifty proof-gallons, or more, per day, on showing by sufficient affidavits that there are hogs or other live stock, not less than fifty head in number, depending for their feed on the products of said distillery which would suffer injury if the business of such distillery is stopped; such distillery in that case may be released to the claimant, or any other intervening party, at the discretion of the court, on a bond to be given and approved in open court with two or more sureties for the full appraised value of all the property seized, which value shall be ascertained by three competent appraisers to be designated and appointed by the court. In case of the seizure of, and judgment of forfeiture against, any distillery used or fit for use in the production of distilled spirits having a registered producing capacity of less than one hundred and fifty gallons per day, or of any distillery for the non-payment of the special tax, the still, stills, doubler, worm, worm-tub, and all mash-tubs and fermenting tubs shall be so destroyed as to prevent the use of the same or any part thereof for the purpose of distilling; and the materials shall be sold as in case of other forfeited property.

SEC. 43. *And be it further enacted*, That it shall be the duty of every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand, or stamp required by law, at the time of emptying such cask or package, to efface and obliterate said mark, stamp, or brand. Any such cask or package from which said mark, brand, and stamp is not so effaced and obliterated, as herein required, shall be forfeited to the United States, and may be seized by any officer of internal revenue wherever found. Any railroad company, or other transportation company, or person, who shall receive or transport, or have in possession with intention to transport, or with intent to cause or procure to be transported, any such empty cask or package, or any part thereof, having thereon any brand, mark, or stamp required by law to be placed on any cask or package containing distilled spirits, shall forfeit three hundred dollars for each such cask or package, or any part thereof, so received or transported, or had in possession with the intent aforesaid; and any boat, railroad car, cart, dray, wagon, or other vehicle, and all horses or other animals used in carrying or transporting the same, shall be forfeited to the United States. Any person who shall fail or neglect to efface and obliterate said mark, stamp, or brand, at the time of emptying such cask or package, or who shall receive any such cask or package, or any part thereof, with the intent aforesaid, or who shall transport the same, or knowingly aid or assist therein, or who shall remove any stamp provided by this act from any cask or package containing or which had contained distilled spirits, without defacing and destroying the same at the time of such removal, or who shall aid or assist therein, or who shall have in his possession any such stamp so removed as aforesaid, or have in his possession any canceled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled

spirits, shall be deemed guilty of a felony, and, on conviction, shall be fined not less than five hundred dollars nor more than ten thousand dollars, and imprisoned not less than one year nor more than five years.

SEC. 44. *And be it further enacted*, That any person who shall carry on the business of a distiller, rectifier, compounder of liquors,
54 wholesale liquor-dealer, retail liquor-dealer, or manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller, with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in the store or other place of business of the compounder, or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises; and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

SEC. 45. *And be it further enacted*, That every rectifier, wholesale liquor-dealer, and compounder of liquors shall provide himself with a book to be prepared and kept in such form as shall be prescribed by the Commissioner of Internal Revenue, and shall, on the same day on which he receives any spirits, and before he shall draw off any part thereof, or add water or anything thereto, or in any respect alter the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence the spirits were received, by whom distilled, rectified, or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine-gallons and proof-gallons, the kind of spirit, and the number and kind of adhesive stamps thereon; and every such rectifier, compounder, and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same shall be removed from his premises, enter, in like manner, in the said book, the day when, and the name and place of business of the person or firm to whom, such spirits are to be sent, the quantity and the kind or quality of such spirits, and also the number of gallons and fractions of a gallon at proof; and if in the original packages in which they were received, he shall enter the name of the distiller and the serial number of the package. And every such book shall be at all times kept in some public or open place on the premises of such rectifier, wholesale dealer, or compounder of liquors, respectively, for inspection; and any revenue officer may make

an examination of such book and take an abstract therefrom; and every such book, when it has been filled up as aforesaid, shall be preserved by such rectifier, wholesale liquor-dealer, or compounder of liquors, for a period not less than two years; and during such time it shall be produced by him to every revenue officer demanding the same; and if any rectifier, wholesale dealer, or compounder of liquors shall refuse or neglect to provide such book, or to make entries therein as aforesaid, or shall cancel, alter, obliterate, or destroy any part of such book, or any entry therein, or make any false entry therein, or hinder or obstruct any revenue officer from examining such book or making an entry therein, or taking any abstract therefrom; or if such book shall not be preserved, or not produced by any rectifier, or wholesale dealer, or compounder, as hereinbefore directed, he shall pay a penalty of one hundred dollars, and, on conviction, shall be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

SEC. 46. *And be it further enacted*, That it shall not be lawful for any rectifier of distilled spirits, compounder of liquors, liquor-dealer, wholesale or retail liquor-dealer, to purchase or receive any distilled spirits in quantities greater than twenty gallons from any person other than an authorized rectifier of distilled spirits, compounder of liquors, distiller, or wholesale liquor-dealer. Any person violating this section shall forfeit and pay one thousand dollars: *Provided*, That this shall not be held to apply to judicial sales, nor to sales at public auction made by an auctioneer who has paid a special tax as such.

SEC. 47. *And be it further enacted*, That all distilled spirits drawn from any cask or other package and placed in any other cask or package containing not less than ten gallons, and intended for sale, shall be again inspected and gauged, and the cask or package into which it is so transferred shall be marked or branded, and such marking and branding shall distinctly indicate the name of the gauger, the time and place of inspection, the proof of the spirits, the particular name of such spirits as known to the trade, together with the name and place of business of the dealer, rectifier, or compounder, as the case may be; and, in all cases except where such spirits have been rectified or compounded, the name also of the distiller, and the distillery where such spirits were produced, and the serial number of the original package; and the absence of such mark or brand shall be taken and held as sufficient cause and evidence for the forfeiture of such unmarked packages of spirits.

SEC. 48. *And be it further enacted*, That on all wines, liquors, or compounds known or denominated as wine, and made in imitation of sparkling wine or champagne, but not made from grapes grown in the United States, and on all liquors not made from grapes, currants, rhubarb, or berries grown in the United States, but produced by being rectified or mixed with distilled spirits, or by the infusion of any matter in spirits, to be sold as wine, or by any other name, there shall be levied and paid a tax of six dollars per dozen bottles, each bottle containing more than one pint and not more than one quart; or three dollars per dozen bottles, each bottle containing [not] more than one pint, and at the same rate for any quantity of such merchandise, however the same may be put up or whatever be the package. And any person manufacturing, compounding, or putting up such wines, shall, without previous demand, make return, under oath or affirmation, to the assistant assessor, on the first and fifteenth day of each and every month, or within five days thereafter, of the entire amount of such wines manufactured and sold or put up and sold during the first fifteen days of the month and the residue

of the month, respectively, except when the wines so manufactured or put up are used exclusively by the family of the person manufacturing the same; and the tax herein imposed shall be payable at the time such return is made. And in case such manufacturer shall neglect or refuse to make such return within the time specified, the assessor shall
56 proceed to ascertain the amount of tax due, as provided in other cases of a refusal or neglect to make returns, and shall assess the tax, and add a penalty of fifty per centum to the amount; which said tax and also said penalty shall be collected in the manner provided for the collection of tax on monthly and other lists. Any person who shall fraudulently evade or attempt to evade the payment of the tax herein imposed shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

SEC. 49. *And be it further enacted*, That the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, may appoint not exceeding twenty-five officers, to be called supervisors of internal revenue, each one of whom shall be assigned to a designated territorial district to be composed of one or more judicial districts and territories, and shall keep his office at some convenient place in his district to be designated by the Commissioner, and shall receive, in addition to expenses necessarily incurred by him and allowed and certified by the said Commissioner, as a compensation for his services such salary as the Commissioner of Internal Revenue may deem just and reasonable, not exceeding three thousand dollars per annum. It shall be the duty of every supervisor of internal revenue, under the direction of the Commissioner, to see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with; to aid in the prevention, detection, and punishment of any frauds in relation thereto, and to examine into the efficiency and conduct of all officers of internal revenue within his district; and for such purposes he shall have power to examine all persons, books, papers, accounts, and premises, and to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel a compliance with such summons in the same manner as assessors may do. It shall be the duty of every supervisor of internal revenue as aforesaid to report in writing to the Commissioner of Internal Revenue any neglect of duty, incompetency, delinquency, or malfeasance in office of any internal revenue officer within his district of which he may obtain knowledge, with a statement of all the facts in each case, and any evidence sustaining the same; and he shall have power to transfer any inspector, gauger, or storekeeper from one distillery or other place of duty to another, or from one collection district to another, within his district, and may, by notice in writing, suspend from duty any such inspector, gauger, or storekeeper, and in case of suspension shall immediately notify the collector of the proper district and the Commissioner of Internal Revenue, and within three days thereafter make report of his action, and his reasons therefor, in writing, to said Commissioner, who shall thereupon take such further action as he may deem proper.

SEC. 50. *And be it further enacted*, That the Commissioner of Internal Revenue shall have power, whenever in his judgment the necessities of the service may require, to employ competent detectives, not exceeding twenty-five in number at any one time, to be paid under the provisions of the seventh section of the "Act to amend existing laws relating to internal revenue, and for other purposes," approved March 2, 1867, and he may, at his discretion, assign any such detective to duty under the

direction of any supervisor of internal revenue, or to such other special duty as he may deem necessary, and that from and after the passage of this act no general or special agent or inspector, by whatever name or designation he may be known, of the Treasury Department, in connection with the internal revenue, except inspectors of tobacco, snuff,
57 and cigars, and except as provided for in this act, shall be appointed, commissioned, employed, or continued in office, and the term of office or employment of all such general or special agents or inspectors now authorized as aforesaid under employment at the time of the passage of this act shall expire ten days after this act shall take effect.

SEC. 51. *And be it further enacted*, That from and after the passage of this act no assessor or collector shall be detailed or authorized to discharge any duty imposed by law on any other collector or assessor, but a supervisor of internal revenue may, within his territorial district, suspend any collector or assessor for fraud, or gross neglect of duty, or abuse of power, and shall immediately report his action to the Commissioner of Internal Revenue, with his reasons therefor in writing, who shall thereupon take such further action as he may deem proper.

SEC. 52. *And be it further enacted*, That there shall be appointed by the Secretary of the Treasury such number of internal-revenue storekeepers as may be necessary, the compensation of each of whom shall be determined by the Commissioner of Internal Revenue, not exceeding five dollars per day, to be paid by the United States, one or more of whom shall be assigned by the Commissioner of Internal Revenue to every bonded or distillery warehouse established by law; and no such storekeeper shall be engaged in any other business while in the service of the United States without the written permission of the Commissioner of Internal Revenue. Every storekeeper shall take an oath faithfully to perform the duties of his office, and shall give a bond, to be approved by the Commissioner of Internal Revenue, for the faithful discharge of his duties, in such form and for such amount as the Commissioner may prescribe. Every storekeeper shall have charge of the warehouse to which he may be assigned, under the direction of the collector controlling the same, which warehouse shall be in the joint custody of such storekeeper and the proprietor thereof, and kept securely locked, and shall at no time be unlocked and opened, or remain open, unless in the presence of such storekeeper or other person who may be designated to act for him as hereinafter provided; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse. Every storekeeper shall keep a warehouse-book, which shall at all times be open to the examination of any revenue officer, in which he shall enter an account of all articles deposited in the warehouse to which he is assigned, indicating in each case the date of the deposit, by whom manufactured or produced, the number and description of the packages and contents, the quantities therein, the marks and serial numbers thereon, and by whom gauged, inspected, or weighed, and, if distilled spirits, the number of gauge or wine gallons and of proof-gallons; and before delivering any article from the warehouse he shall enter in said book the date of the permit or order of the collector for the delivery of such articles, the number and description of the packages, the marks and serial numbers thereon, the date of delivery, to whom delivered, and for what purpose, which purpose shall be specified in the permit or order for delivery; and in case of delivery of any distilled spirits the number of gauge or wine gallons and of proof-gallons

shall also be stated; and such further particulars shall be entered in the warehouse-books as may be prescribed or found necessary for the identification of the packages, to insure the correct delivery thereof and proper accountability *thereof* [therefor.] A daily return shall be furnished by every storekeeper to the collector of the district of all articles received in and delivered from the warehouse during the day
58 preceding that on which the return is made, a copy of which shall be mailed by him at the same time to the Commissioner of Internal Revenue; and each storekeeper shall, on the first Monday of every month, make a report in triplicate of the number of packages of all articles, with the several descriptions thereof respectively, as above provided, which remained in the warehouse at the date of his last report, and of all articles received therein and delivered therefrom during the preceding month, and of all articles remaining therein at the end of said month; one of which reports shall be by him delivered to the assessor of the district, to be recorded and filed in his office; one delivered to the collector having control of the warehouse, to be recorded and filed in his office; and one transmitted to the Commissioner of Internal Revenue, to be recorded and filed in his office. Any internal-revenue storekeeper may be transferred by the supervisor of the district or by the Commissioner of Internal Revenue from one warehouse to any other. In case of the absence of any internal-revenue storekeeper by sickness, or from any other cause, the collector having control of the warehouse may designate a person to have temporary charge of such warehouse, who shall, during such absence, perform the duties and receive the pay of the storekeeper for the time he may be so employed; and for any violation of the law he shall be subject to the same punishment as storekeepers. Any storekeeper or other person in the employment of the United States having charge of a bonded warehouse, who shall remove or allow to be removed any cask or other package therefrom without an order or permit of the collector, or which has not been marked or stamped in the manner required by law, or shall remove or allow to be removed any part of the contents of any cask or package deposited therein, shall be immediately dismissed from office or employment, and, on conviction, be fined not less than five hundred dollars nor more than two thousand dollars, and imprisoned not less than three months nor more than two years.

SEC 53. *And be it further enacted*, That there shall be appointed by the Secretary of the Treasury, in every collection district where the same may be necessary, one or more internal-revenue gaugers, who shall each take an oath faithfully to perform his duties, and shall give his bond, with one or more sureties satisfactory to the Commissioner of Internal Revenue, for the faithful discharge of the duties assigned to him by law or regulations; and the penal sum of said bond shall not be less than five thousand dollars, and said bond shall be renewed or strengthened as the Commissioner of Internal Revenue may require. The duties of every such gauger shall be performed under the supervision and direction of the collector of the district to which he may be assigned, or of the collector in charge of exports at any port of entry to which he may be assigned. Fees for gauging and inspecting shall be prescribed by the Commissioner of Internal Revenue, to be paid to the collector by the owner or producer of the articles to be gauged and inspected; and said collector shall retain all amounts so received as such fees until the last day of each month, when the aggregate amount of fees so paid that month shall, under regulation to be prescribed by the Commissioner of Internal Revenue, be paid to the gauger or gaugers

performing the duty. In no case, however, shall the aggregate monthly fees of any gauger exceed the rate of three thousand dollars per annum. All necessary labor and expense attending the gauging of any article shall be borne by the owner or producer of such articles. Every gauger shall, under such regulations as may be prescribed by the Commissioner of Internal Revenue, make a daily return, in duplicate; one to be delivered to the assessor and the other to the collector of his dis-
59 trict, giving a true account, in detail, of all articles gauged and proved or inspected by him, and for whom, and the number and kind of stamps used by him. Any gauger who shall make any false or fraudulent inspection, gauging, or proof shall pay a penalty of one thousand dollars, and, on conviction, shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

SEC. 54. *And be it further enacted*, That a drawback shall be allowed upon alcohol and rum exported to foreign countries on which taxes have been paid under the provisions of this act when exported as herein provided for. The drawback allowed shall include the taxes levied and paid upon the alcohol or rum exported, not, however, exceeding sixty cents per gallon proof-spirits, which shall be due and payable only after the proper entries and bonds have been executed and filed, and all other conditions complied with as hereinafter required, and thirty days after the vessel has actually cleared and sailed on her voyage with such spirits on board; and the Secretary of the Treasury shall prescribe such rules and regulations in relation thereto as may be necessary to secure the Treasury of the United States against frauds. And if any person shall fraudulently claim or seek to obtain an allowance of drawback on any alcohol or rum, or shall fraudulently claim any greater allowance *or* drawback than the tax actually paid thereon, such person shall forfeit and pay to the Government of the United States triple the amount wrongfully and fraudulently sought to be obtained, and, on conviction, shall be imprisoned not less than one year nor more than ten years. And any owner, agent, or master of any vessel who shall knowingly aid or abet in the fraudulent collection or fraudulent attempt to collect any drawback upon rum or alcohol, or shall knowingly aid or permit any fraudulent change in the spirits so shipped, shall, on conviction, be fined five thousand dollars and imprisoned not less than one year, and the ship or vessel on board of which such shipment was made, or pretended to be made, shall be forfeited to the United States, whether a conviction of the master or owner be had or otherwise, and proceedings may be had in admiralty by libel for such forfeiture.

SEC. 55. *And be it further enacted*, That alcohol and rum may be exported with the privilege of drawback, in quantities not less than two thousand gallons, and in packages containing not less than thirty gallons each, on application of the owner thereof to the collector of customs at any port of entry, and under such rules and regulations, and after making such entries, and executing such bonds, and giving such other additional security as may be prescribed by law and by the Secretary of the Treasury. The entry for such exportation shall be in triplicate, and shall contain the name of the person applying to export, the name of the distiller, and of the district in which the spirits were distilled, and the name of the vessel by which, and the name of the port to which, they are to be exported; and the form of the entry shall be as follows:

Export entry of distilled spirits entitled to drawback.

Entry of spirits distilled by —— ——, in —— district, State

of ———, to be exported by ——— ———, in the ———, whereof ——— ——— is master, bound to ———.

And the entry shall specify the whole number of casks or packages, the marks and serial numbers thereon, the quality or kind of spirits as known in commerce, the number of gauge or wine gallons and of proof-gallons; and amount of the tax on such spirits shall be verified by the oath or affirmation of the owner of the spirits, and that the tax
60 has been paid thereon, and that they are truly intended to be exported to the port of ———, and not to be relanded within the limits of the United States; and said owner shall give his bond executed in duplicate, with one or more sureties satisfactory to said collector, conditioned that the principal named in said bond will export the spirits as specified in said entry to the port of ———, and that the same shall not be landed within the jurisdiction of the United States. The penal sum named in said bond shall be equal to not less than double the amount of the drawback on such spirits. For the discharge of any such export bond the same time shall be allowed, and the same certificates of landing and other evidence shall be required as is or may be provided and required for imported merchandise exported from the United States, that the said spirts have been landed at the port named, or at any other port, beyond the jurisdiction of the United States. One bill of lading, duly signed by the master of the vessel, shall be deposited with said collector, to be filed at his office with the entry, retained by him; one of said entries shall be, when the shipment is completed, transmitted, with the duplicate of the bond, to the Secretary of the Treasury, to be recorded and filed in his office. The lading on board said vessel shall be only after the receipt of an order or permit, signed by the collector of customs and directed to a customs gauger, and after each cask or package shall have been distinctly marked or branded, by said gauger, as follows: "For export from U. S. A." The casks or packages shall be inspected and gauged alongside of or on the vessel by the gauger, designated by said collector, under such rules and regulations as the Secretary of the Treasury may prescribe; and on application of the said collector, it shall be the duty of the surveyor of the port to designate and direct one of the custom-house inspectors to superintend such shipment. The gauger, as aforesaid, shall make a full return of such inspecting and gauging, certifying thereon that the shipment has been made, in his presence, on board the vessel named in the entry for export, which return shall be indorsed by said custom-house inspector, certifying that the casks or packages have been shipped under his supervision on board said vessel; and the said inspector shall make a similar certificate to the surveyor of the port, indorsed on, or to be attached to, the entry in possession of the custom-house: *Provided, however*, That no claim for drawback shall be allowed on either of the said articles which shall have been exported as aforesaid prior to the time at which this act shall take effect.

SEC. 56. *And be it further enacted*, That all distilled spirits in any bonded warehouse shall, within nine months after the passage of this act, be withdrawn from such warehouse, and the taxes paid on the same; and the casks or packages containing said spirits shall be marked and stamped and be subject in all respects to the same requirements as if manufactured after the passage of this act. And any distilled spirits remaining in any bonded warehouse for a period of more than nine months after the passage of this act shall be forfeited to the United States, and shall be sold or disposed of for the benefit of the same in such manner as shall be prescribed by the Commissioner of Internal Revenue,

under the direction of the Secretary of the Treasury. And whenever, in the opinion of the Commissioner of Internal Revenue, any distillery or other warehouse shall become unsafe or unfit for use, or the merchandise therein shall for any reason be liable to loss or great wastage, the Commissioner may discontinue such warehouse, and require that the merchandise therein shall be transferred to such other warehouse as may be designated by him within such time as he shall prescribe. Such transfer shall be made under the supervision of the collector, or such
61 other officer as may be designated by the Commissioner; and the expense thereof shall be paid by the owner of the merchandise; and if the owner of such merchandise shall fail to make such transfer within the time prescribed, or to pay the just and proper expense of such transfer, as ascertained and determined by the Commissioner, such merchandise may be seized and sold by the collector in the same manner as goods are sold upon distraint for taxes, and the proceeds of such sale shall be applied to the payment of the taxes due thereon and the costs and expenses of such sale and removal, and the balance paid over to the owner of such merchandise.

SEC. 57. *And be it further enacted* That any person owning, or having in his possession, any distilled spirits intended for sale, exceeding in quantity fifty gallons, and not in a bonded warehouse when this act takes effect, shall immediately make a return, under oath, to the collector of the district wherein such spirits may be held, stating the number and kind of packages, together with the marks and brands thereon, and the place where the same are stored, together with the quantity of spirits, as nearly as the owner can determine the same. Upon the receipt of such return the collector, being first satisfied that the tax on said spirits has been paid, shall immediately cause the same to be gauged and proved by an internal-revenue gauger, who shall mark, by cutting, the contents and proof on each cask or package containing five wine-gallons or more, and shall affix and cancel an engraved stamp thereon; which stamp shall be as follows:

Stamp for stock on hand. No.——.

Issued by——— ———,

——— ———,

Collector of——— district, State of———.

Distilled spirits. Tax paid prior to (here engrave the date when this act takes effect.) ——— proof-gallons. Gauged ———, 18—.

——— ———, *Gauger.*

All distilled spirits owned or held by any person, as aforesaid, shall be included in the same return, and the gauging shall be continuous until all the spirits owned or held by such person are gauged and stamped as aforesaid, and a report thereof in duplicate shall immediately be made by the gauger to the collector and assessor of the district, showing the number of packages, contents, and proof of each package gauged and stamped; and one of said reports shall be transmitted by the collector to the Commissioner of Internal Revenue. No such spirits shall be gauged or stamped in any cistern or other stationary vessel. Any person owning or having in possession such spirits, and refusing or neglecting to make such return, shall forfeit the same; and all distilled spirits, found after thirty days from the time this act takes effect, in any cask or package containing more than five gallons, without having thereon each mark and stamp required therefor by this act, shall be forfeited to the United States. Any person who shall gauge, mark, or stamp any cask or package of distilled spirits under

the provisions of this section, or who shall cause or procure the same to be done, knowing that the same were manufactured or removed from warehouse subsequent to the taking effect of this act, or that the taxes thereon have not been paid, shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. All stamps required by this action shall be prepared, issued, and affixed
62 upon casks and packages, and canceled in the same manner as provided for other stamps for distilled spirits in this act, and shall be charged at the rate of twenty-five cents for each stamp.

SEC. 58. *And be it further enacted*, That all distilled spirits forfeited to the United States, sold by order of court or under process of distraint, shall be sold subject to tax; and the purchaser shall immediately, and before he takes possession of said spirits, pay the tax thereon. And any distilled spirits condemned before the passage of this act, and in the possession of the United States, shall be sold as herein provided. And if any tax-paid stamps are affixed to any cask or package so condemned, such stamps shall be obliterated and destroyed by the collector or marshal after forfeiture and before such sale.

SEC. 59. *And be it further enacted*, That the following special taxes shall be, and are hereby, imposed; that is to say:

Distillers producing one hundred barrels or less of distilled spirits, counting forty gallons of proof-spirits to the barrel, within the year, shall each pay four hundred dollars; and if producing more than one hundred barrels, shall pay in addition four dollars for each such barrel produced in excess of one hundred barrels. And monthly returns of the number of barrels of spirits, as before described, distilled by him shall be made by each distiller in the same manner as monthly returns of sales are made. Every person who produces distilled spirits, or who brews or makes mash, wort, or wash, fit for distillation or for the production of spirits, or who by any process of evaporization separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, shall be regarded as a distiller: *Provided*, That a like tax of four dollars on each barrel, counting forty gallons of proof-spirits to the barrel, shall be assessed and collected from the owner of any distilled spirits which may be in any bonded warehouse at the date of the taking effect of this act, to be paid whenever the same shall be withdrawn from such warehouse, under the provisions of the sixty-second section of this act: *Provided*, That no tax shall be imposed for any still, stills, or other apparatus used by druggists and chemists for the recovery of alcohol for pharmaceutical and chemical or scientific purposes which has been used in those processes.

Rectifiers of distilled spirits, rectifying, purifying, or refining two hundred barrels or less of distilled spirits, counting forty gallons of proof-spirits to the barrel, within the year, shall each pay two hundred dollars, and shall pay fifty cents for each such barrel produced in excess of two hundred barrels. And monthly returns of the quantity and proof of all the spirits purchased and of the number of barrels of spirits, as before described, rectified, purified, or refined by him shall be made by each rectifier in the same manner as monthly returns of sales are made. Every person who rectifies, purifies, or refines distilled spirits or wines by any process, and every wholesale or retail liquor-dealer or compounder of liquors who has in his possession any still or leach-tub, or who shall keep any other apparatus for the purpose of refining in any manner distilled spirits, shall be regarded as a rectifier.

Compounders of liquors shall each pay twenty-five dollars. Every

person who, without rectifying, purifying, or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any materials, manufacture any spurious, imitation, or compound liquors, for sale under the name of whisky, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a compounder of liquors.

Retail dealers in liquors shall pay twenty-five dollars. Every person who shall sell, or offer for sale, foreign or domestic spirits, wine, ale, beer, or other malt liquors, and whose annual sales, including all
63 sales of other merchandise, do not exceed twenty-five thousand dollars, shall be regarded as a retail dealer in liquors.

Wholesale liquor-dealers, whose annual sales do not exceed twenty-five thousand dollars, shall pay one hundred dollars; and if exceeding twenty-five thousand dollars, shall each pay in addition ten dollars for every one thousand dollars of sale of such spirits, wines, or liquors, in excess of twenty-five thousand dollars, and on other sales shall pay as wholesale dealers; and such excess shall be asse[sse]d and paid in the same manner as required of wholesale dealers. Every person who sells, or offers for sale, distilled spirits, wines, or malt liquors, whose annual sales shall exceed twenty-five thousand dollars, shall be regarded as a wholesale liquor-dealer. But no distiller or brewer, who has paid his special tax as such, and who sells only distilled spirits or malt liquors of his own production, at the place of manufacture, in the original casks or packages in which they are placed for the purpose of affixing the tax stamps, shall be required to pay the special tax of a wholesale dealer. But the payment of any special tax imposed by this act shall not be held or construed to exempt any person carrying on any trade, business, or profession from any penalty or punishment therefor provided by the laws of any State; nor to authorize the commencement or continuance of any such trade, business, or profession, contrary to the laws of any State, or in places prohibited by municipal law; nor shall the payment of any such tax be held or construed to prohibit or prevent any State from placing a duty or tax on the same trade, business, or profession for State or other purposes.

Manufacturers of stills shall each pay fifty dollars, and twenty dollars for each still or worm for distilling made by him. Any person who manufactures any still or worm to be used in distilling shall be deemed a manufacturer of stills.

TOBACCO, SNUFF, AND CIGARS.

Dealers in leaf tobacco, whose annual sales do not exceed ten thousand dollars, shall each pay twenty-five dollars; and if their annual sales exceed ten thousand dollars, shall pay in addition two dollars for every thousand dollars in excess of ten thousand dollars. Every person shall be regarded as a dealer in leaf tobacco whose business it is, for himself or on commission, to sell, or offer for sale, leaf tobacco. And payment of a special tax as wholesale dealer, tobacconist, manufacturer of cigars, or manufacturer of tobacco, shall not exempt any person dealing in leaf tobacco from the payment of the special tax therefor hereby required. But no farmer or planter shall be required to pay a special tax as a dealer in leaf tobacco for selling tobacco of his own production, or tobacco received by him as rent from tenants who have produced the same on his land.

Dealers in tobacco, whose annual sales exceed one hundred dollars and do not exceed one thousand dollars, shall each pay five dollars;

and when their annual sales exceed one thousand dollars, shall pay in addition two dollars for each thousand dollars in excess of one thousand dollars. Every person whose business it is to sell or offer for sale manufactured tobacco, snuff, or cigars, shall be regarded as a dealer in tobacco. And any retail dealer, liquor-dealer, or keeper of a hotel, inn, tavern, or eating-house, who sells tobacco, snuff, or cigars, shall pay, in addition to his special tax, the special tax as a dealer in tobacco.

Manufacturers of tobacco shall each pay ten dollars; and in addition thereto, where the amount of the penal sum of the bond of such
64 manufacturer, required by this act to be given, shall exceed the sum of five thousand dollars, two dollars for each thousand dollars in excess of five thousand dollars of such penal sum. Every person whose business it is to manufacture tobacco or snuff for himself, or who shall employ others to manufacture tobacco or snuff, whether such manufacture shall be by cutting, pressing, grinding, crushing, or rubbing of any leaf or raw tobacco, or otherwise preparing raw or leaf tobacco, or manufactured or partially manufactured tobacco or snuff, or the putting up for use or consumption of scraps, waste, clippings, stems, or deposits of tobacco, resulting from any process of handling tobacco, shall be regarded as a manufacturer of tobacco. But no manufacturer of tobacco shall be required to pay the special tax as a dealer in tobacco for selling the products of his own manufacture.

Manufacturers of cigars, whose annual sales shall not exceed five thousand dollars, shall each pay ten dollars, and when their annual sales exceed five thousand dollars, shall pay in addition two dollars for each thousand dollars in excess of five thousand dollars. Every person whose business it is to make or manufacture cigars for himself, or who shall employ others to make or manufacture cigars, shall be regarded as a manufacturer of cigars. No special tax receipt shall be issued to any manufacturer of cigars until he shall have given the bond required by law. Every person whose business it is to make cigars for others, either for pay, upon commission, on shares, or otherwise, from material furnished by others, shall be regarded as a cigar-maker. Every cigar-maker shall cause his name and residence to be registered, without previous demand, with the assistant assessor of the division in which such cigar-maker shall be employed; and any manufacturer of cigars employing any cigar-maker who shall have neglected or refused to make such registry shall, on conviction, be fined five dollars for each day that such cigar-maker so offending by neglect or refusal to register shall be employed by him.

SEC. 60. *And be it further enacted*, That in every case where it becomes necessary to ascertain the amount of annual or monthly sales made by any person on whom a special tax is imposed by this act, or to ascertain the excess of such sales above a given amount, such amounts and excesses shall be ascertained and returned under such regulations and in such form as shall be prescribed by the Commissioner of Internal Revenue; and in any case where the amount of the tax has been increased by this act above the amount before paid by any person in that behalf, such person, except retail dealers, shall be again assessed and pay the amount of such increase from the taking effect of this act; and in any case where the amount of sales or receipts has been understated or underestimated by any person, such person shall be again assessed for such deficiency, and shall be required to pay the same, with any penalty or penalties that may by law have accrued or be chargeable thereon.

SEC. 61. *And be it further enacted*, That upon tobacco and snuff which

shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected the following taxes:

On snuff, manufactured of tobacco or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, a tax of thirty-two cents per pound. And snuff-flour, when sold, or removed for use or consumption, shall be taxed as snuff, and shall be put up in packages and stamped in the same manner as snuff.

On all chewing tobacco, fine-cut, plug, or twist; on all tobacco twisted by hand, or reduced from leaf into a condition to be consumed, or otherwise prepared, without the use of any machine or instrument, and without being pressed or sweetened; and on all other kinds of manufactured tobacco, not herein otherwise provided for, a tax of thirty-two cents per pound.

On all smoking tobacco, exclusively of stems, or of leaf, with all the stems in, and so sold, the leaf not having been previously stripped, butted, or rolled, and from which no part of the stems have been separated by sifting, stripping, dressing, or in any other manner, either before, during, or after the process of manufacturing; on all fine-cut shorts, the refuse of fine-cut chewing tobacco which has passed through a riddle of thirty-six meshes to the square inch by process of sifting, and on all refuse scraps and sweepings of tobacco, a tax of sixteen cents per pound.

SEC. 62. *And be it further enacted*, That from and after the passage of this act all manufactured tobacco shall be put up and prepared by the manufacturer for sale, or removal for sale or consumption, in packages of the following description, and in no other manner:

All snuff in packages containing one, two, four six, eight, and sixteen ounces, or in bladders containing not exceeding ten pounds each, or in jars containing not exceeding twenty pounds.

All fine-cut chewing tobacco, and all other kinds of tobacco not otherwise provided for, in packages containing one-half, one, two, four, eight, and sixteen ounces, except that fine-cut chewing tobacco may, at the option of the manufacturer, be put up in wooden packages containing ten, twenty, forty, and sixty pounds each.

All smoking tobacco, all fine-cut shorts which has passed through a riddle of thirty-six meshes to the square inch, and all refuse scraps and sweepings of tobacco, in packages containing two, four, eight, and sixteen ounces each.

All cavendish, plug, and twist tobacco in wooden packages not exceeding two hundred pounds net weight.

And every such wooden package shall have printed or marked thereon the manufacturer's name and place of manufacture, or the proprietor's name and his trade-mark and the registered number of the manufactory, and the gross weight, the tare, and the net weight of the tobacco in each package: *Provided*, That these limitations and descriptions of packages shall not apply to tobacco and snuff transported in bond for exportation and actually exported.

SEC. 63. *And be it further enacted*, That every person before commencing or, if already commenced, before continuing the manufacture of tobacco or snuff, shall, in addition to a compliance with all other provisions of law, furnish, without previous demand therefor, to the assessor or assistant assessor of the district where the manufacture is to be carried on, a statement, in duplicate, subscribed under oath or affirmation, accurately setting forth the place, and, if in a city, the street and number of the street, where the manufacture is to be carried on; the number

of cutting machines, presses, snuff mills, hand mills, or other machines; the name, kind, and quality of the article manufactured, or proposed to be manufactured; and, if the same shall be manufactured for, or to be sold and delivered to, any other person, as agent, or under a special contract, the name and residence and business or occupation of the person for whom the said article is to be manufactured, or to whom it is to be delivered; and shall give a bond in conformity with the provisions of this act, to be approved by the collector of the district, in the sum of two thousand dollars, with an addition to said sum of three thousand dollars for each cutting machine kept for use, of one thousand dollars for each screw press kept for use in making plug or pressed tobacco, of five thousand dollars for each hydraulic press kept for use, of one 66 thousand dollars for each snuff mill kept for use, and of one thousand dollars for each hand mill, or other mill or machine, kept for the grinding, cutting, or crushing of tobacco, that he will not engage in any attempt, by himself or by collusion with others, to defraud the Government of any tax on his manufactures; that he will render truly and correctly all the returns, statements, and inventories prescribed by law or regulations; that whenever he shall add to the number of cutting machines, presses, snuff mills, hand mills, or other mills or machines as aforesaid, he will immediately give notice thereof to the collector of the district; that he will stamp, in accordance with law, all tobacco and snuff manufactured by him before he removes any part thereof from the place of manufacture; that he will not knowingly sell, purchase, expose, or receive for sale any manufactured tobacco or snuff which has not been stamped as required by law; and that he will comply with all the requirements of law relating to the manufacture of tobacco or snuff. And the sum of the said bond may be increased from time to time, and additional sureties required by the collector, under the instructions of the Commissioner of Internal Revenue. And every manufacturer shall obtain a certificate from the collector of the district, who is hereby authorized and directed to issue the same, setting forth the kind and number of machines, presses, snuff mills, hand mills, or other mills and machines, as aforesaid, for which the bond has been given, which certificate shall be posted in a conspicuous place within the manufactory. And any tobacco manufacturer who shall neglect or refuse to obtain such certificate, or to keep the same posted as hereinbefore provided, shall, on conviction, be fined not less than one hundred dollars nor more than five hundred dollars. And any person manufacturing tobacco or snuff of any description without first giving bond as herein required, shall, on conviction, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned for not less than one year nor more than five years. And the working or preparation of any leaf tobacco, or tobacco stems, scraps, clippings, or waste, by sifting, twisting, screening, or any other process, shall be deemed manufacturing.

SEC. 64. *And be it further enacted*, That within thirty days after the passage of this act every manufacturer of tobacco and snuff shall place and keep on the side or end of the building within which his business is carried on, so that it can be distinctly seen, a sign, with letters thereon not less than three inches in length, painted in oil colors or gilded, giving his full name and business. Any person neglecting to comply with the requirements of this section shall, on conviction, be fined not less than one hundred dollars nor more than five hundred dollars.

SEC. 65. *And be it further enacted*, That it shall be the duty of every assistant assessor to keep a record, in a book or books to be provided

for the purpose, to be open to the inspection of any person, of the name and residence of every person engaged in the manufacture of tobacco or snuff in his division, the place where such manufacture is carried on, and the number of the manufactory; and the assistant assessor shall enter in said record, under the name of each manufacturer, a copy of every inventory required by this act to be made by such manufacturer, and an abstract of his monthly returns; and each assessor shall keep a similar record for the district, and shall cause the several manufactories of tobacco or snuff in his district to be numbered consecutively, which numbers shall not thereafter be changed.

SEC. 66. *And be it further enacted*, That every person, now or hereafter engaged in the manufacture of tobacco or snuff, shall make and deliver to the assistant assessor of the division a true inventory, in such form as shall be prescribed by the Commissioner of Internal Revenue,
67 of the quantity of each of the different kinds of tobacco, snuff-flour, snuff, stems, scraps, clippings, waste, tinfoil, licorice, sugar, gum, and other materials held or owned by him on the first day of January of each year, or at the time of commencing and at the time of concluding business, if before or after the first of January, setting forth what portion of said goods and materials, and what kinds, were manufactured or produced by him, and what was purchased from others, which inventory shall be verified by his oath or affirmation; and the assistant assessor shall make personal examination of the stock sufficient to satisfy himself as to the correctness of the inventory, and shall verify the fact of such examination by oath or affirmation taken before the assessor, to be indorsed on or affixed to the inventory; and every such person shall keep a book or books, the forms of which shall be prescribed by the Commissioner of Internal Revenue, and enter therein daily an accurate account of all the articles aforesaid purchased by him, the quantity of tobacco, snuff and snuff-flour, stems, scraps, clippings, waste, tinfoil, licorice, sugar, gum, and other materials, of whatever description, whether manufactured, (and if plug tobacco the number of net pounds of lumps made in the lump-room, and the number of packages and pounds produced in the press-room each day,) sold, consumed, or removed for consumption or sale, or removed from the place of manufacture in bond, and to what district; and shall, on or before the tenth day of each and every month, furnish to the assistant assessor of the division a true and accurate abstract from such book of all such purchases, sales, and removals made during the month next preceding, which abstract shall be verified by his oath or affirmation; and in case of refusal or willful neglect to deliver the inventory, or keep the account, or furnish the abstract aforesaid, he shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. And it shall be the duty of any dealer in leaf tobacco, or in any material used in manufacturing tobacco or snuff, on demand of any officer of internal revenue, to render a true and correct statement, verified by oath or affirmation, of the quantity and amount of such leaf tobacco or materials sold or delivered to any person named in such demand; and in case of refusal or neglect to render such statement, or if there is cause to believe such statement to be incorrect or fraudulent, the assessor shall make an examination of persons, books, and papers in the same manner as provided in this act in relation to frauds and evasions.

SEC. 67. *And be it further enacted*, That the Commissioner of Internal Revenue shall cause to be prepared suitable and special revenue stamps

for payment of the tax on tobacco and snuff, which stamps shall indicate the weight and class of the article on which payment is to be made, and shall be affixed and canceled in the mode prescribed by the Commissioner of Internal Revenue, and stamps when used on any wooden package shall be canceled by sinking a portion of the same into the wood with a steel die, also such warehouse stamps as are required by this act, which stamps shall be furnished to the collectors of internal revenue requiring the same, who shall each keep at all times a supply equal in amount to three months' sales thereof, and shall sell the same only to manufacturers of tobacco and snuff in their respective districts who have given bonds as required by law, to owners or consignees of tobacco or snuff, upon the requisition of the proper custom-house officer having the custody of such tobacco or snuff, and to persons required by law to affix the same to tobacco or snuff on hand on the first day of January, anno Domini eighteen hundred and sixty-nine; and every collector
68 shall keep an account of the number, amount, and denominate values of stamps sold by him to each manufacturer, and to other persons above described.

SEC. 68. *And be it further enacted*, That every manufacturer of tobacco or snuff shall, in addition to all other requirements of this act relating to tobacco, print on each package or securely affix by pasting on each package containing tobacco or snuff manufactured by or for him, a label on which shall be printed, together with the proprietor's or manufacturer's name, the number of the manufactory, and the district and State in which it is situated, these words:

"NOTICE.—The manufacturer of this tobacco has complied with all the requirements of law. Every person is cautioned, under the penalties of law, not to use this package for tobacco again."

Any manufacturer of tobacco who shall neglect to print on or affix such label to any package containing tobacco made by or for him, or sold or offered for sale by or for him, or any person who shall remove any such label so affixed from any such package, shall, on conviction, be fined fifty dollars for each package in respect to which such offense shall be committed.

SEC. 69. *And be it further enacted*, That any manufacturer of tobacco or snuff who shall remove otherwise than as provided by law, or sell, any tobacco or snuff without the proper stamps denoting the tax thereon, or without having paid the special tax, or given bond as required by law, or who shall make false or fraudulent entries of manufactures or sales of tobacco or snuff, or who shall make false or fraudulent entries of the purchase or sales of leaf tobacco, tobacco stems, or other material, or who shall affix any false, forged, fraudulent, spurious, or counterfeit stamp, or imitation of any stamp required by this act, to any box or package containing any tobacco or snuff, shall, in addition to the penalties elsewhere provided in this act for such offenses, forfeit to the United States all the raw material and manufactured or partly manufactured tobacco and snuff, and all machinery, tools, implements, apparatus, fixtures, boxes, and barrels, and all other materials which shall be found in the possession of such person, in the manufactory of such person, or elsewhere.

SEC. 70. *And be it further enacted*, That the absence of the proper stamp on any package of manufactured tobacco or snuff shall be notice to all persons that the tax has not been paid thereon, and shall be prima-facie evidence of the non-payment thereof. And such tobacco or snuff shall be forfeited to the United States.

SEC. 71. *And be it further enacted*, That any person who shall remove

from any manufactory, or from any place where tobacco or snuff is made, any manufactured tobacco or snuff without the same being put up in proper packages, or without the proper stamp for the amount thereon being affixed and canceled, as required by law; or if intended for export, without the proper warehouse stamp being affixed; or shall use, sell, or offer for sale, or have in possession, except in the manufactory, or in a bonded warehouse, any manufactured tobacco or snuff, without proper stamps being affixed and canceled; or shall sell, or offer for sale, for consumption in the United States, or use, or have in possession, except in the manufactory or in a bonded warehouse, any manufactured tobacco or snuff on which only the warehouse stamp marking the same for export has been affixed, shall, on conviction thereof for each such offense, respectively, be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years. And any person who shall affix to any package containing tobacco or snuff any false, forged, fraudulent, spurious,
69 or counterfeit stamp, or a stamp which has been before used, shall be deemed guilty of a felony, and on conviction shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than two years nor more than five years.

SEC. 72. *And be it further enacted*, That whenever any stamped box, bag, vessel, wrapper, or envelope of any kind, containing tobacco or snuff, shall be emptied, the stamped portion thereof shall be destroyed by the person in whose hands the same may be. And any person who shall willfully neglect or refuse so to do shall, for each such offense, on conviction, be fined fifty dollars, and imprisoned not less than ten days nor more than six months. And any person who shall sell or give away, or who shall buy or accept from another, any such empty stamp box, bag, vessel, wrapper, or envelope of any kind, or the stamped portion thereof, shall, for each such offense, on conviction, be fined one hundred dollars and imprisoned not less than twenty days and not more than one year. And any manufacturer or other person who shall put tobacco or snuff into any such box, bag, vessel, wrapper, or envelope, the same having been either emptied or partially emptied, shall, for each such offense, on conviction, be fined not less than one hundred nor more then five hundred dollars, and imprisoned for not less than one nor more than three years.

SEC. 73. *And be it further enacted*, That the Commissioner of Internal Revenue, upon the execution of such bonds as he may prescribe, may designate and establish, at any port of entry in the United States, bonded warehouses for the storage of manufactured tobacco and snuff in bond, intended for exportation, selecting suitable buildings for such purpose, to be recommended by the collector in charge of exports at such port, to be known as export bonded warehouses, and used exclusively for the storage of manufactured tobacco and snuff in bond. Every such warehouse shall be under the control of the collector of internal revenue in charge of exports at the port where such warehouse is located, and shall be in charge of an internal-revenue storekeeper assigned thereto by the Commissioner of Internal Revenue. No manufactured tobacco or snuff shall be withdrawn or removed from any bonded warehouse without an order or permit from the collector in charge of exports at such port, which shall be issued only for the immediate transfor to a vessel by which such tobacco or snuff is to be exported to a foreign country, as hereinafter provided, or after the tax has been paid thereon. And such warehouse shall be under such further regulations as the

Commissioner of Internal Revenue may prescribe. Any manufactured tobacco and snuff may be withdrawn once, and no more, from an export bonded warehouse for transportation to any other port of entry in the United States where an export bonded warehouse for the storage of manufactured tobacco and snuff may have been established, and such manufactured tobacco and snuff so withdrawn shall, on its arrival at the second port of entry, be immediately warehoused in an export bonded warehouse for the storage of manufactured tobacco and snuff, from which it shall be withdrawn only as provided by law.

SEC. 74. *And be it further enacted*, That manufactured tobacco and snuff may be removed in bond from the manufactory, without payment of the tax, to be transported directly to an export bonded warehouse for the storage of manufactured tobacco or snuff established at a port of entry as hereinbefore provided; and the deposit in and withdrawal from any bonded warehouse, the transportation and exportation of manufactured tobacco and snuff, shall be made under such rules and regulations, and after making such entries and executing such
70 bonds, and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue, which shall in all respects, so far as applicable, conform to the provisions of law and regulations relating to distilled spirits to be deposited in or withdrawn from bonded warehouse or transported or exported. All tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, twenty-five cents for each package so stamped shall be paid to the collector on making the entry for such transportation; but the provisions of this section shall not limit the time for tobacco or snuff to remain in bond.

SEC. 75. *And be it further enacted*, That in all cases where tobacco or snuff of any description is manufactured, in whole or in part, upon commission or shares, or where the material from which any such articles are made, or to be made, is furnished by one person and made or manufactured by another, or where the material is furnished or sold by one person with an understanding or agreement with another that the manufactured article is to be received in payment therefor, or for any part thereof, the stamps required by law shall be fixed by the actual maker or manufacturer before the article passes from the place of making or manufacturing. And in case of fraud on the part of either of said persons in respect to said manufacture, or of any collusion on their part with intent to defraud the revenue, such material and manufactured articles shall be forfeited to the United States; and each party to such fraud or collusion shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned for not less than six months nor more than three years.

SEC. 76. *And be it further enacted*, That every dealer in leaf tobacco shall enter daily in a book kept for that purpose, under such regulations as the Commissioner of Internal Revenue may prescribe, the number of hogsheads, cases, and pounds of leaf tobacco purchased by him, and of whom purchased, and the number of hogsheads, cases, or pounds sold by him, with the name and residence, in each instance, of the person to whom sold, and, if shipped, to whom shipped, and to what district. Such books shall be kept at his place of business, and shall be open at all

hours to the inspection of any assessor, collector, or other revenue officer; and any dealer in leaf tobacco who shall neglect or refuse to keep such book shall be liable to a penalty of not less than five hundred dollars, and on conviction thereof shall be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more then two years.

SEC. 77. *And be it further enacted*, That from and after the passage of this act, and until the first day of October, eighteen hundred and sixty-eight, all manufactured tobacco and snuff (not including cigars) imported from foreign countries shall be placed by the owner, importer, or consignee thereof in a bonded warehouse of the United States at the place of importation, in the same manner and under rules as provided for warehousing goods imported into the United States, and shall not be withdrawn from such warehouse, nor be entered for consumption or transportation in the United States prior to the said first day of October, eighteen hundred and sixty-eight. All manufactured tobacco and snuff (not including cigars) imported from foreign countries, after the passage of this act, shall, in addition to the import duties imposed
71 on the same, pay the tax prescribed in this act for like kinds of tobacco and snuff manufactured in the United States, and have the same stamps respectively affixed. Such stamps shall be affixed and canceled on all such articles so imported by the owner or importer thereof while such articles are in the custody of the proper custom-house officers, and such articles shall not pass out of the custody of such officers until the stamps have been affixed and canceled. Such tobacco and snuff shall be put up in packages, as prescribed in this act for like articles manufactured in the United States before such stamps are affixed; and the owner or importer of such tobacco and snuff shall be liable to all the penal provisions of this act prescribed for manufacturers of tobacco and snuff manufactured in the United States. Where it shall be necessary to take any such articles, so imported, to any place for the purpose of repacking, affixing, and canceling such stamps, other than the public stores of the United States, the collector of customs of the port where such articles shall be entered shall designate a bonded warehouse to which such articles shall be taken, under the control of such custom officer as such collector may direct. And any officer of customs who shall permit any such articles to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years.

SEC. 78. *And be it further enacted*, That from and after the passage of this act it shall be the duty of every dealer in manufactured tobacco having on hand more than twenty pounds, and every dealer in snuff having on hand more than ten pounds, to immediately make a true and correct inventory of the amount of such tobacco and snuff, respectively, under oath or affirmation, and to deposit such inventory with the assistant assessor of the proper division, who shall immediately return the same to the assessor of the district, who shall immediately thereafter make an abstract of the several inventories filed in his office, and transmit such abstract to the Commissioner of Internal Revenue, and a like inventory and return shall be made on the first day of every month thereafter, and a like abstract of inventories shall be transmitted while any such dealer has tobacco or snuff remaining on hand manufactured in the United States, or imported prior to the passage of this act, and not

stamped. After the first day of January, eighteen hundred and sixty-nine, all smoking, fine-cut chewing tobacco, or snuff, and after the first day of July, eighteen hundred and sixty-nine, all other manufactured tobacco of every description, shall be taken and deemed as having been manufactured after the passage of this act, and shall not be sold or offered for sale unless put up in packages and stamped as prescribed by this act, except at retail by retail dealers from wooden packages stamped as provided for in this act; and any person who shall sell, or offer for sale, after the first day of January, eighteen hundred and sixty-nine, any smoking, fine-cut chewing tobacco, or snuff, and after the first day of July, eighteen hundred and sixty-nine, any other manufactured tobacco not so put up in packages and stamped, shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

SEC. 79. *And be it further enacted*, That any person who shall, after the passage of this act, sell, or offer for sale, any manufactured tobacco or snuff, representing the same to have been manufactured and the tax paid thereon prior to the passage of this act, when the same was not so manufactured, and the tax not so paid, shall be liable to a pen-
72 alty of five hundred dollars for each offense, and shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than five hundred dollars nor more than five thousand dollars, and shall be imprisoned not less than six months nor more than two years.

SEC. 80. *And be it further enacted*, That all manufactured tobacco and snuff, manufactured prior to the passage of this act, and held in bond at the time of its passage, may be sold for consumption in the original packages, with the proper stamps for the amount of the tax thereon affixed and canceled as required by law; and any person who shall, after the passage of this act, offer for sale any tobacco or snuff, in packages of a different size from those limited and prescribed by this act, representing the same to have been held in bond at the time of the passage of this act, when the same was not so held in bond, shall, on conviction, be fined fifty dollars for each package in respect to which such offense shall be committed: *Provided*, That after the first day of January, anno Domini eighteen hundred and sixty-nine, no such tobacco or snuff shall be sold or removed for sale or consumption from any bonded warehouse unless put up in packages and stamped as provided by this act.

SEC. 81. *And be it further enacted*, That upon cigars which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected the following taxes, to be paid by the manufacturer thereof:

On cigars of all descriptions, made of tobacco or any substitute therefor, five dollars per thousand; on cigarettes weighing not exceeding three pounds per thousand, one dollar and fifty cents per thousand; when weighing exceeding three pounds per thousand, five dollars per thousand. And the Commissioner of Internal Revenue may prescribe such regulations for the inspection of cigars, cheroots, and cigarettes, and the collection of the tax thereon, as shall, in his judgment, be most effective for the prevention of frauds in the payment of such tax.

SEC. 82. *And be it further enacted*, That every person before commencing, or, if already commenced, before continuing, the manufacture of cigars, shall furnish, without previous demand therefor, to the assistant assessor of the division a statement in duplicate, subscribed under oath or affirmation, accurately setting forth the place, and, if in a city, the street and number of the street, where the manufacture is to be carried on; and if the same shall be manufactured for, or to be sold and

delivered to, any other person, the name and residence and business or occupation of the person for whom the cigars are to be manufactured, or to whom to be delivered; and shall give a bond in conformity with the provisions of this act, in such penal sum as the assessor of the district may require, not less than five hundred dollars, with an addition of one hundred dollars for each person proposed to be employed by him in making cigars, conditioned that he will not employ any person to manufacture cigars who has not been duly registered as a cigar-maker; that he will not engage in any attempt by himself, or by collusion with others, to defraud the Government of any tax on his manufactures; that he will render truly and correctly all the returns, statements, and inventories prescribed; that whenever he shall add to the number of cigar-makers employed by him he will immediately give notice thereof to the collector of the district; that he will stamp, in accordance with law, all cigars manufactured by him before he offers the same, or any part thereof, for sale, and before he removes any part thereof from the place of manufacture; that he will not knowingly sell, purchase, expose, or receive for sale any cigars which have not been stamped as required by law; and that he will comply with all the requirements
73 of law relating to the manufacture of cigars. The sum of said bond may be increased from time to time, and additional sureties required at the discretion of the assessor, or under the instructions of the Commissioner of Internal Revenue. Every cigar manufacturer shall obtain from the collector of the district, who is hereby required to issue the same, a certificate setting forth the number of cigar-makers for which the bond has been given, which certificate shall be posted in a conspicuous place within the manufactory; and any cigar manufacturer who shall neglect or refuse to obtain such certificate, or to keep the same posted as hereinbefore provided, shall, on conviction, be fined one hundred dollars. Any person manufacturing cigars of any description without first giving bond as herein required, shall, on conviction, be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than five years. Cigarettes and cheroots shall be held to be cigars under the meaning of this act.

SEC. 83. *And be it further enacted*, That within thirty days after the passage of this act every cigar manufacturer shall place and keep on the side or end of the building within which his business is carried on, so that it can be distinctly seen, a sign, with letters thereon not less than three inches in length, painted in oil colors or gilded, giving his full name and business. Any person neglecting to comply with the requirements of this section shall, on conviction, be fined not less than one hundred dollars nor more than five hundred dollars.

SEC. 84. *And be it further enacted*, That it shall be the duty of every assistant assessor to keep a record, in a book to be provided for the purpose, to be open to the inspection of any person, of the name and residence of every person engaged in the manufacture of cigars in his division, the place where such manufacture is carried on, and the number of the manufactory, together with the names and residences of every cigar-maker employed in his division, and the assistant assessor shall enter in said record, under the name of each manufacturer, an abstract of his inventories and monthly returns; and each assessor shall keep a similar record for the district, and shall cause the several manufactories of cigars in the district to be numbered consecutively, which number shall not thereafter be changed.

SEC. 85. *And be it further enacted*, That from and after the passage of

this act all cigars shall be packed in boxes, not before used for that purpose, containing respectively twenty-five, fifty, one hundred, two hundred and fifty, or five hundred cigars each; and any person who shall sell or offer for sale, or deliver or offer to deliver, any cigars in any other form than in new boxes as above described, or who shall pack in any box any cigars in excess of the number provided by law to be put in each box respectively, or who shall falsely brand any box, or shall affix a stamp on any box denoting a less amount of tax than that required by law, shall, upon conviction, for any of the above-described offenses, be fined for each such offense not less than one hundred dollars nor more than one thousand dollars, and be imprisoned not less than six months nor more than two years: *Provided*, That nothing in this section shall be construed as preventing the sale of cigars at retail by retail dealers who have paid the special tax as such from boxes packed, stamped, and branded in the manner prescribed by law.

SEC. 86. *And be it further enacted*, That every person now or hereafter engaged in the manufacture of cigars shall make and deliver to the assistant assessor of the division a true inventory, in form prescribed by the Commissioner of Internal Revenue, of the quantity of leaf
74 tobacco, cigars, stems, scraps, clippings, and waste, and the number of cigar boxes, and the capacity of each box, held or owned by him on the first day of January of each year, or at the time of commencing and at the time of concluding business, if before or after the first of January, setting forth what portion of said goods, and what kinds, were manufactured or produced by him, and what were purchased from others, which inventory shall be verified by his oath or affirmation indorsed on said inventory; and the assistant assessor shall make personal examination of the stock sufficient to satisfy himself as to the correctness of the inventory, and shall verify the fact of such examination by oath or affirmation taken before the assessor, also to be indorsed on the inventory; and every such person shall enter daily in a book, the form of which shall be prescribed by the Commissioner of Internal Revenue, an accurate account of all the articles aforesaid purchased by him, the quantity of leaf tobacco, cigars, stems, or cigar boxes, of whatever description, manufactured, sold, consumed, or removed for consumption or sale, or removed from the place of manufacture; and shall, on or before the tenth day of each and every month, furnish to the assistant assessor of the division a true and accurate abstract from such book of all such purchases, sales, and removals made during the month next preceding, which abstract shall be verified by his oath or affirmation; and in case of refusal or willful neglect to deliver the inventory, or keep the account, or furnish the abstract aforesaid, he shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. It shall be the duty of any dealer in leaf tobacco or material used in manufacturing cigars, on demand of any officer of internal revenue authorized by law, to render to such officer a true and correct statement, verified by oath or affirmation, of the quantity and amount of such leaf tobacco or materials sold or delivered to any person or persons named in such demand; and in case of refusal or neglect to render such statement, or if there is cause to believe such statement to be incorrect or fraudulent, the assessor shall make an examination of persons, books, and papers, in the same manner as provided in this act in relation to frauds and evasions.

SEC. 87. *And be it further enacted*, That the Commissioner of Internal Revenue shall cause to be prepared, for payment of the tax upon cigars,

suitable stamps denoting the tax thereon; and all cigars shall be packed in quantities of twenty-five, fifty, one hundred, two hundred and fifty, and five hundred, and all such stamps shall be furnished to collectors requiring the same, who shall, if there be any cigar manufacturers within their respective districts, keep on hand at all times a supply equal in amount to two months' sales thereof, and shall sell the same only to the cigar manufacturers who have given bonds and paid the special tax, as required by law, in their districts respectively, and to importers of cigars who are required to affix the same to imported cigars in the custody of customs officers and to persons required by law to affix the same to cigars on hand on the first day of January, anno Domini eighteen hundred and sixty-nine; and every collector shall keep an account of the number, amount, and denominate values of the stamps sold by him to each cigar manufacturer, and to other persons above described: *Provided*, That from and after the passage of this act, the duty on all cigars imported into the United States from foreign countries shall be two dollars and fifty cents [per] pound, and twenty-five per centum ad valorem.

SEC. 88. *And be it further enacted*, That every manufacturer of cigars shall securely affix, by pasting on each box containing cigars manufactured by or for him, a label on which shall be printed, together with the manufacturer's name, the number of his manufactory, and the district and State in which it is situated, these words:

"NOTICE.—The manufacturer of the cigars herein contained has complied with all the requirements of law. Every person is cautioned, under the penalties of law, not to use this box for cigars again."

Any manufacturer of cigars who shall neglect to affix such label to any box containing cigars made by or for him, or sold or offered for sale by or for him, or any person who shall remove any such label so affixed from any such box, shall, upon conviction thereof, be fined fifty dollars for each box in respect to which such offense shall be committed.

SEC. 89. *And be it further enacted*, That all cigars which shall be removed from any manufactory or place where cigars are made without the same being packed in boxes as required by this act, or without the proper stamp thereon denoting the tax, or without burning into each box with a branding iron the number of the cigars contained therein, and the name of the manufacturer, and the number of the district and the State, or without the stamp denoting the tax thereon being properly affixed and canceled, or which shall be sold or offered for sale not properly boxed and stamped, shall be forfeited to the United States. And any person who shall commit any of the above-described offenses, shall, on conviction, be fined for each such offense not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than six months nor more than two years. And any person who shall pack cigars in any box bearing a false or fraudulent or counterfeit stamp, or who shall remove or cause to be removed any stamp denoting the tax on cigars from any box, with intent to use the same, or who shall use or permit any other person to use any stamp so removed, or who shall receive, buy, sell, give away, or have in his possession any stamp so removed, or who shall make any other fraudulent use of any stamp or stamped box intended for cigars, or who shall remove from the place of manufacture any cigars not properly boxed and stamped as required by law, shall be deemed guilty of a felony, and, on conviction, shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than six months nor more than three years.

SEC. 90. *And be it further enacted*, That the absence of the proper revenue stamp on any box of cigars sold, or offered for sale, or kept for

sale, shall be notice to all persons that the tax has not been paid thereon, and shall be prima-facie evidence of the non-payment thereof; and such cigars shall be forfeited to the United States.

SEC. 91. *And be it further enacted*, That in all cases where cigars of any description are manufactured, in whole or in part, upon commission or shares, or where the material is furnished by one party and manufactured by another, or where the material is furnished or sold by one party with an understanding or agreement with another that the cigars are to be received in payment therefor, or for any part thereof, the stamps required by law shall be affixed by the actual maker before the cigars are removed from the place of manufacturing. And in case of fraud on the part of either of said parties in respect to said manufacture, or of any collusion on their part with intent to defraud the revenue, such material and cigars shall be forfeited to the United States, and every person engaged in such fraud or collusion shall, on conviction, be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned for not less than six months nor more than three years.

SEC. 92. *And be it further enacted*, That any manufacturer of cigars, who shall remove or sell any cigars without payment of the special tax as a cigar manufacturer, or without having given bond as such,
76 or without the proper stamps denoting the tax thereon, or who shall make false or fraudulent entries of manufactures or sale of any cigars, or who shall make false or fraudulent entries of the purchase or sales of leaf tobacco, tobacco stems, or other material used in the manufacture of cigars, or who shall affix any false, forged, spurious, fraudulent, or counterfeit stamp, or imitation of any stamp required by law to any box containing any cigars, shall, in addition to the penalties elsewhere provided in this act for such offenses, forfeit to the United States all raw material and manufactured or partly manufactured tobacco and cigars, and all machinery, tools, implements, apparatus, fixtures, boxes, barrels, and all other materials, which shall be found in the possession of such person, or in his manufactory, and used in his business as such manufacturer, together with his estate or interest in the building or factory and the lot or tract of ground on which such building or factory is located, and all appurtenances thereunto belonging.

SEC. 93. *And be it further enacted*, That all cigars imported from foreign countries after the passage of this act shall, in addition to the import duties imposed on the same, pay the tax prescribed in this act for cigars manufactured in the United States, and have the same stamps affixed. Such stamps shall be affixed and canceled by the owner or importer of cigars while they are in the custody of the proper custom-house officers; and such cigars shall not pass out of the custody of such officers until the stamps have been so affixed and canceled, but shall be put up in boxes containing quantities as prescribed in this act for cigars manufactured in the United States before such stamps are affixed. And the owner or importer of such cigars shall be liable to all the penal provisions of this act prescribed for manufacturers of cigars manufactured in the United States. Where it shall be necessary to take any of such cigars so imported to any place for the purpose of affixing and canceling such stamps, other than the public stores of the United States, the collector of customs of the port where such cigars shall be entered shall designate a bonded warehouse to which they shall be taken, under the control of such customs officer as such collector may direct. And any officer of customs who shall permit any such cigars to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto shall be deemed guilty of a

misdemeanor, and shall, on conviction thereof, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years.

SEC. 94. *And be it further enacted*, That from and after the passage of this act it shall be the duty of every dealer in cigars, either of foreign or domestic manufacture, having on hand more than five thousand thereof, imported or manufactured, or purporting or claimed to have been imported or manufactured, prior to the passage of this act, to immediately make a true and correct inventory of the quantity of such cigars in his possession, under oath or affirmation, and to deposit such inventory with the assistant assessor of the proper division, who shall immediately return the same to the assessor of the district, who shall immediately thereafter make an abstract of the several such inventories filed in his office, and transmit the same to the Commissioner of Internal Revenue; and a like inventory and return shall be made on the first day of every month thereafter, and a like abstract of inventories shall be transmitted, while any such dealer has any such cigars remaining on hand, until the first day of April, eighteen hundred and sixty-nine. After the first day of April, eighteen hundred and sixty-nine, all cigars of every description shall be taken to have been either manufactured or imported after the
77 passage of this act, and shall be stamped accordingly; and any person who shall sell, or offer for sale, after the first day of April, eighteen hundred and sixty-nine, any imported cigars, or cigars purporting or claimed to have been imported, not so put up in packages and stamped as provided by this act, shall, on conviction thereof, be fined not less than five hundred dollars, nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

SEC. 95. *And be it further enacted*, That any person who shall, after the passage of this act, sell or offer for sale any cigars, representing the same to have been manufactured and the tax paid thereon prior to the passage of this act, when the same were not so manufactured and the tax not so paid, shall be liable to a penalty of five hundred dollars for each offense, and shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than five hundred dollars, nor more than five thousand dollars, and imprisoned not less than six months nor more than three years.

SEC. 96. *And be it further enacted*, That if any distiller, rectifier, wholesale liquor-dealer, compounder of liquors, or manufacturer of tobacco or cigars, shall knowingly and willfully omit, neglect, or refuse to do or cause to be done any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be a distiller, rectifier, wholesale liquor-dealer, or compounder of liquors, all distilled spirits or liquors owned by him, or in which he has any interest as owner, and if he be a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory, shall be forfeited to the United States.

SEC. 97. *And be it further enacted*, That any internal-revenue officer who shall be or become interested, directly or indirectly, in the manufacture of tobacco, snuff, or cigars, or in the production, rectification, or redistillation of distilled spirits, shall be dismissed from office; and any such officer who shall become so interested in any such manufacture or production, rectification, or redistillation, shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars.

SEC. 98. *And be it further enacted*, That if any officer or agent appointed and acting under the authority of any revenue law of the United States shall be guilty of any extortion or willful oppression, under color of law; or shall knowingly demand other or greater sums than shall be authorized by law; or shall receive any fee, compensation, or reward for the performance of any duty except as by law prescribed; or shall willfully neglect to perform any of the duties enjoined on him by law; or shall conspire or collude with any other person to defraud the United States; or shall make opportunity for any person to defraud the United States; or shall do, or omit to do, any act with intent to enable any other person to defraud the United States; or shall negligently or designedly permit any violation of the law by any other person; or shall make or sign any false entry in any book, or make or sign any false certificate or return in any case where he is by law or regulation required to make any entry, certificate, or retun; or having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law of the United States, shall fail to report, in writing, such knowledge or information to his next superior officer, and to the Commissioner of Internal Revenue; or shall demand, or accept, or
78 attempt to collect, directly or indirectly, as payment or gift or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do, he shall be dismissed from office, and shall be held to be guilty of a misdemeanor, and shall, on conviction, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. And one-half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer who shall be ascertained by the judgment of the court; and the said court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution.

SEC. 99. *And be it further enacted*, That any person who shall simulate or falsely or fraudulently execute or sign any bond, permit, entry, or other document required by the provisions of this act, or by any regulation made in pursuance thereof, or who shall procure the same to be falsely or fraudulently executed; or who shall advise, aid in, or connive at the execution thereof, shall, on conviction, be imprisoned for a term not less than one year nor more than five years; and the property to which such false or fraudulent instrument relates shall be forfeited.

SEC. 100. *And be it further enacted*, That every collector having charge of any warehouse in which distilled spirits, tobacco, or other articles are stored in bond shall render a monthly account of all such articles to the Commissioner of Internal Revenue, which account shall be examined and adjusted monthly by him, so as to exhibit a true statement of the liability and responsibility of every such collector on such account. In adjusting such account the collector shall be charged with all the articles which may have been deposited or received under the provisions of law in any warehouse in his district and under his control, and shall be credited with all such articles shown to have been removed therefrom according to law, including transfers to other collectors and to his successor in office, and also whatever allowances may have been made in accordance with law to any owner of such goods or articles for leakage or other losses.

SEC. 101. *And be it further enacted*, That the Secretary of the Treasury

and Commissioner of Internal Revenue are authorized and empowered to alter, renew, or change the form, style, and device of any stamp, mark, or label used under any provision of the laws relating to distilled spirits, tobacco, snuff, and cigars, when in their judgment necessary for the collection of revenue tax, or the prevention or detection of frauds thereon; and to make and publish such regulations for the use of such mark, stamp, or label as they may find requisite. But in no case shall such renewal or change extend to an abandonment of the general character of the stamps provided for in this act, nor to the dispensing with any provisions requiring that such stamps shall be kept in book-form and have thereon the signatures of revenue officers.

SEC. 102. *And be it further enacted*, That in all cases arising under the internal-revenue laws where, instead of commencing or proceeding with a suit in court, it may appear to the Commissioner of Internal Revenue to be for the interest of the United States to compromise the same, he is empowered and authorized to make such compromise with the advice and consent of the Secretary of the Treasury; and in every case where a compromise is made, there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or officer acting as such, with his reasons therefor, together with a state-
79 ment of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise; but no such compromise shall be made of any case after a suit or proceeding in court has been commenced, without the recommendation also of the Attorney General: *Provided*, That it shall be lawful for the court at any stage of such suit or criminal proceedings to continue the same for good cause shown, on motion of the district attorney.

SEC. 103. *And be it further enacted*, That when any tax is imposed, and the mode or time of assessment or collection is not provided for, the same shall be established by regulation of the Commissioner of Internal Revenue; and the Commissioner is authorized to make all such regulations, not otherwise provided for, as may become necessary by reason of any change of law in relation to internal revenue made by this act.

SEC. 104. *And be it further enacted*, That where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word "person," as used in this act, shall be construed to mean and include a firm, partnership, association, company, or corporation, as well as a natural person; and words of the masculine gender, as applied to persons, to mean and include the feminine gender; and the singular number to mean and include the plural number; and the word "State" to mean and include a Territory and District of Columbia; and the word "county," to mean and include parish, district, or other equivalent territorial subdivision of a State.

SEC. 105. *And be it further enacted*, That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed: *Provided*, That all the provisions of said acts shall be in force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former acts, the right to which has already accrued or which may hereafter accrue under said acts, and for maintaining, continuing, and enforcing liens, fines, penalties, and forfeitures incurred under and by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved; and all suits and prosecutions for acts already done in violation of any former act or

acts of Congress, relating to the subjects embraced in this act, may be commenced or proceeded with in like manner as if this act had not been passed: *And provided further*, That no office created by the said acts and continued by this act shall be vacated by reason of any provisions herein contained, but the officers heretofore appointed shall continue to hold the said offices without reappointment until their successors, or others officers to perform their duties, respectively, shall be appointed as provided in this act: *And provided further*, That whenever the duty imposed by any existing law shall cease in consequence of any limitation therein contained before the respective provisions of this act shall take effect, the same duty or tax shall be, and is hereby, continued until such provisions of this act shall take effect; and where any act is hereby repealed, no duty or tax imposed thereby shall be held to cease in consequence of such repeal until the respective *correspective* corresponding provisions of this act shall take effect.

SEC. 106. *And be it further enacted*, That in any case where there has been a refusal or neglect to pay any tax imposed by the internal-revenue laws, and where it is lawful and has become necessary to seize and sell real estate to satisfy the tax, the Commissioner of Internal Revenue may, if he deems it expedient, direct that a bill in chancery be
80 filed, in a district or circuit court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned by the delinquent, or in which he has any right, title, or interest to the payment of such tax. And all persons having liens upon the real estate sought to be subjected to the payment of any tax as aforesaid, or claiming any ownership or interest therein, shall be made parties to such proceedings, and shall be brought into court as provided in other suits in chancery in said courts. And the said courts shall have, and are hereby given, jurisdiction in all such cases, and shall at the term next after such time as the parties shall be duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein, and to pass upon and finally determine the merits of all claims to and liens upon the real estate in question, and shall, in all cases where a claim or interest of the United States therein shall be established, decree a sale, by the proper officer of the court, of such real estate, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

SEC. 107. *And be it further enacted*, That the internal-revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, shall be held and construed to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not.

SEC. 108. *And be it further enacted*, That all provisions of this act which require the use of stamps shall take effect at the end of sixty days from the passage of this act: *Provided*, That if at any time prior to the expiration of the said sixty days it shall be shown to the satisfaction of the Secretary of the Treasury that a longer delay is necessary for the preparation and due delivery of any of such stamps, he shall be authorized to fix a day not later than the first day of December next for putting said provisions, relative to the use of either of such stamps, into operation, and shall give public notice of the day so fixed and determined upon, which day shall then be held and taken to be the time when that portion of this act which requires the use of stamps shall have effect.

SEC. 109. *And be it further enacted*, That so much of all acts and

parts of acts as impose any internal-revenue tax on illuminating or other mineral oil, and on the product of the distillation, redistillation, or refining of crude petroleum, or of crude oil produced by a single distillation of coal, shale, peat, asphaltum, or other bituminous substances, together with all provisions relating to returns, assessment, warehousing, and bonding, and all other provisions for determining the quantity of mineral oil distilled, for the purpose of securing the payment of the tax thereon, be, and the same are hereby, repealed; and no tax imposed by existing laws on such oils or products in the hands of the producer or manufacturer or his agent or agents at the passage of this act, and unsold, shall be collected; but distillers and refiners of mineral oils shall be considered as manufacturers and subject to the tax on sales provided for in the fourth section of the act "to exempt certain manufactures from internal tax, and for other purposes," approved March thirty-first, eighteen hundred and sixty-eight.

Approved July 20, 1868.

81 AN ACT to prevent frauds in the collection of the tax on distilled spirits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act no distilled spirits shall be withdrawn or removed from any warehouse for the purpose of transportation, redistillation, rectification, change of package, exportation, or for any other purpose whatever, until the full tax on such spirits shall have been duly paid to the collector of the proper district; and all acts and parts of acts inconsistent with the provisions of this act be, and they are hereby, repealed.

Approved January 11, 1868.

AN ACT to provide for the exemption of cotton from internal tax.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all cotton grown in the United States after the year eighteen hundred and sixty-seven shall be exempt from internal tax; and cotton imported from foreign countries on and after November first, eighteen hundred and sixty-eight, shall be exempt from duty.

Approved February 3, 1868.

AN ACT to exempt certain manufacturers from internal tax, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections ninety-four and ninety-five of the act entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June thirtieth, eighteen hundred and sixty-four, and all acts and parts of acts amendatory of said sections, be, and the same are, hereby repealed, except only so much of the said sections and amendments thereto as relates to the taxes imposed thereby on gas made of coal wholly or in part, or of any other material; on illuminating, lubricating, or other mineral oils or articles, the products of the distillation, redistillation, or refining of crude petroleum, or of a single distillation of coal, shale, peat, asphaltum, or other bituminous substances; on wines therein described; and on snuff and all the other manufactures of tobacco, including cigarettes, cigars, and cheroots: *Provided*, That the products of petroleum and bituminous substances hereinbefore mentioned, except illuminating gas, shall, from and after the passage of this act, be taxed at one-half the rates fixed by the said section ninety-four.

SEC. 2. *And be it further enacted*, That nothing in this act contained shall be construed to repeal or interfere with any law, regulation, or provision for the assessment or collection of any tax which, under existing laws, may accrue before the first day of April, anno Domini eighteen hundred and sixty-eight. And nothing herein contained shall be construed as a repeal of any tax upon machinery or other articles which have been or may be delivered on contracts made with the United States prior to the passage of this act.

SEC. 3. *And be it further enacted*, That after the first day of June next no drawback of internal taxes paid on manufactures shall be allowed on the exportation of any article of domestic manufacture on which there is no internal tax at the time of exportation; nor shall such
82 drawback be allowed in any case unless it shall be proved, by sworn evidence in writing, to the satisfaction of the Commissioner of Internal Revenue, that the tax had been paid, and that such articles of manufacture were, prior to the first day of April, eighteen hundred and sixty-eight, actually purchased or actually manufactured and contracted for, to be delivered for such exportation; and no claim for such drawback or for any drawback of internal tax on exportations made prior to the passage of this act shall be paid unless presented to the Commissioner of Internal Revenue before the first day of October, eighteen hundred and sixty-eight.

SEC. 4. *And be it further enacted*, That every person, firm, or corporation who shall manufacture by hand or machinery any goods, wares, or merchandise, (breadstuffs and unmanufactured lumber excepted,) not otherwise specifically taxed as such, or who shall be engaged in the manufacture or preparation for sale of any articles of compounds not otherwise specifically taxed, or shall put up for sale in packages with his own name or trade-mark thereon any articles or compound not otherwise specifically taxed, and whose annual sales exceed five thousand dollars, shall pay, for every additional thousand dollars in excess of five thousand dollars, two dollars, and the amount of sales in excess of the rate of five thousand dollars per annum shall be returned quarter-yearly to the assistant assessor, and the tax on the excess of five thousand dollars shall be assessed by the assessor and paid quarter-yearly in the months of January, April, July, and October of each year, as other taxes are assessed and paid. And the first assessment herein provided for shall be made in the month of July, eighteen hundred and sixty-eight, for the three months then next preceding.

SEC. 5. *And be it further enacted*, That every person engaged in carrying on the business of a distiller who shall defraud or attempt to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall, on conviction, be fined not less than five hundred dollars nor *nor* more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

SEC. 6. *And be it furthed enacted*, That if any officer or agent appointed and acting under the authority of any revenue law of the United States shall be guilty of gross neglect in the discharge of any of the duties of his office, or shall conspire or collude with any other person to defraud the United States, or shall make opportunity for any person to defraud the United States, or shall do or omit to do any act with intent to enable any other person to defraud the United States, or shall make or sign any false certificate or return, in any case where he is by law or regulation required to make a certificate or return, or having knowledge or

information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law of the United States, shall fail to report, in writing, such knowledge or information to his next superior officer and to the Commissioner of Internal Revenue, he shall, on conviction, be fined not less than one thousand dollars nor more than five thousand dollars, and shall be imprisoned not less than six months nor more than three years.

SEC. 7. *And be it further enacted*, That no compromise or discontinuance, or nolle prosequi of any prosecution under this act, shall be allowed without the permission, in writing, of the Secretary of the Treasury and the Attorney General.

Approved March 31, 1868.

83 AN ACT for the relief of certain exporters of rum.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of January eleventh, eighteen hundred and sixty-eight, entitled "An act to prevent frauds in the collection of the tax on distilled spirits," be so construed as to permit rum, which at the date of the passage of said act was already distilled or redistilled and intended for export and actually contracted for to be delivered for exportation, to be withdrawn, removed, and exported from the United States under such transportation and export bonds and regulations as were required therefor immediately prior to the passage of said act, and as shall be provided for hereafter: *Provided*, That all such spirits shall be actually exported within sixty days from the passage of this act; and that, before any such exportation shall be permitted, proof in writing shall be furnished, by sworn evidence, to the satisfaction of the Commissioner of Internal Revenue, that such rum was in fact at the date mentioned intended for export, and distilled or redistilled for that purpose or actually contracted for to be so exported. And upon failure to so export the same within sixty days, the tax thereon shall become due and payable, and the bonds given for the transportation and export thereof shall be forfeited and collected, as in case of such bonds not canceled according to law.

Approved June 25, 1868.

JOINT RESOLUTION to correct an act entitled "An act for the relief of certain exporters of rum."

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the word "and" where it occurs in said act after the word "export" and before the words "actually contracted" be changed to "or," so that the corrected act shall read, "intended for export or actually contracted for."

Approved July 6, 1868.

AN ACT to correct an error in the enrollment of the "Act imposing taxes on distilled spirits and tobacco, and for other purposes."

Be it enacted by the Senate and House of Representatatives of the United States of America in Congress assembled, That the last clause of the first sentence of section forty-eight of the "Act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July twentieth, eighteen hundred and sixty-eight, be amended so that it will read, "or three dollars per dozen bottles, each bottle containing not more than one pint," etc., instead of "each bottle containing more than one pint, etc., the word "not" having been omitted in the enrollment of the act.

Approved July 27, 1868.

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97 *Series 4, No. 7.—United States internal revenue.—Regulations and instructions concerning the tax on distilled spirits, under the act of July 20, 1868.—August 3, 1868.—Washington: Government Printing Office, 1868.*

98 Series 4, No. 7.—Regulations and instructions concerning the tax on distilled spirits.

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, August 3, 1868.

By the act of July 20, 1868, (section 1,) there is laid on all distilled spirits upon which no tax has been paid a tax of 50 cents on every proof-gallon, to be paid by the distiller, owner, or person having possession thereof, before removal from the distillery warehouse; and (section 59) an additional tax of $4 on each barrel of forty proof-gallons of distilled spirits in any bonded warehouse at the date of the taking effect of the act.

BASIS OF TAXATION.

The tax of 50 cents per gallon is to be collected on the whole number of gauge or wine gallons when the spirits are below proof, and upon the proof-gallon when of greater strength than proof. The tax of $4 per barrel of 40 proof-gallons is upon the proof-gallons, making an addition of ten cents for each proof-gallon, and where the spirits are below proof the tax will be 50 cents per wine-gallon, to which will be added ten cents per proof-gallon.

DISTILLERS' SPECIAL TAX.

Distillers producing 100 barrels or less, counting 40 proof-gallons to the barrel, must each pay a special tax of $400, and $4 for each barrel in excess of 100 barrels, and monthly returns of the number of barrels of distilled spirits produced must be made by each distiller as the monthly returns of sales are made.

There must also be assessed and collected monthly from every authorized distiller an additional tax of $2 per day, Sundays excepted, when the distillery has an aggregate capacity for mashing and fermenting 20 bushels of grain or less, or 60 gallons of molasses or less in 24 hours; and a tax of $2 per day for each 20 bushels of grain or 60 gallons of molasses of said capacity, in excess of 20 bushels of grain or 60 gallons of molasses in 24 hours. But any distiller suspending work, as pro-

vided in the act, will pay only $2 per day while the work is so suspended.

99 TAX TO BE A LIEN.

Every proprietor or possessor of a still, distillery, or distilling apparatus is made jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax is a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, and on the lot or tract of land whereon the distillery is situated, together with any building thereon, from the time said spirits are distilled until the tax is paid.

DISTILLER DEFINED.

Every person who produces distilled spirits, or who brews or makes mash, wort, or wash fit for distillation, or for the production of spirits, or who may, by any process of vaporization, separate alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, is regarded as a distiller.

MASH, WORT, OR WASH.

No mash, wort, or wash fit for distillation, or the production of spirits or alcohol, can lawfully be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented can be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, can, by distillation or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person can use spirits or alcohol, or any vapor of alcoholic spirits, in manufacturing vinegar, or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery, and a tax thereon paid.

NO OTHER BUSINESS TO BE DONE IN A DISTILLERY.

The use of any still, boiler, or other vessel, for the purpose of distilling, is forbidden (section 12) in any dwelling-house, or shed, yard, or enclosure connected therewith, or on board of any vessel or boat, or in any building, or on any premises where beer, lager-beer, ale, porter, or other fermented liquors, ether, or vinegar are manufactured or produced, or sugars or sirups are refined, or liquors of any description are retailed, or any other business is carried on, or within 600 feet of any premises authorized to be used for rectifying. The only exceptions are the manufacture of saleratus, and the grinding of meal or flour from grain to be used only for distillation on the premises.

REGISTRY OF STILLS.

Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, must register the
100 same with the assistant assessor of the division in which such still or distilling apparatus is located within 60 days from July 20; and all stills hereafter set up must be registered immediately on

being set up. The application for registry will be in duplicate on Form 26, one of which will be retained and preserved by the assistant assessor, and the other transmitted by him to the assessor of the district. All stills and distilling apparatus set up must be registered, whether they are intended to be used or not. Each assessor will enter the registry of all stills in a book, to be kept in his office and open to inspection, denoting each distillery by its number.

DISTILLERS' NOTICE.

Every person engaged in the business of a distiller, or intending to engage therein, (section 6,) must give notice on Form 27, which is hereby prescribed, over his own signature, to the assessor of the district in which such business is, or is to be, carried on, who will furnish a copy thereof to the collector. Like notice of any change in the location, form, capacity, ownership, agency, or superintendence, or in the persons interested in the business of said distillery, or in the time of fermenting the mash or beer, is to be given within 24 hours of such change.

BONDS.

Every distiller, on filing his notice with the assessor, must, before continuing or commencing business after the passage of the act, and on the first day of May in each sueceeding year, make and execute a bond on Form 30, which is hereby prescribed, with at least two sureties to be approved by the assessor of the district. Assessors will give especial attention to the instructions printed thereon, and will require the sureties to justify on Form 33 as the owners of unencumbered real estate at least equal in value to the penal sum of the bond.

Under the provisions of section 8 no distiller's bond can be approved unless he is the owner in fee, unencumbered by any mortgage, judgment, or other lien, of the lot or tract of land on which the distillery is situated, or unless he files with the assessor, in connection with his notice, the written consent of the owner of the fee, and of any mortgagee, judgment creditor, or other person having a lien thereon, that the premises may be used for the purpose of distilling spirits subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment, or other encumbrance, and that in case of the forfeiture of the distillery premises, or any part thereof, the title of the same shall vest in the United States, discharged from any such mortgage, judgment, or other encumbrance. This instrument must be duly acknowledged and executed with all the formalities required in conveyances of real estate, and must be duly recorded before the same is filed with the assessor.

101 As the question as to the title to the real estate is material, the assessor should require of the distiller a properly certified statement or search of the title to such estate to be exhibited to him, and full evidence as to what, if any, liens or encumbrances exist thereon.

Where the distiller's estate is for a term of years only, under a lease or other evidence of title recorded before the passage of the act, the distillery or distilling apparatus having also been erected prior to that date, the distiller may, in lieu of the consent and stipulation aforesaid, give an additional bond on Form 3, which is hereby prescribed, with not less than two sureties, residents of the district or county or an adjoining county, and owners of unencumbered real estate in said district

or county equal to the penal sum of the bond. In such case the assessor will cause the value of the lot or tract of land, together with the buildings and distilling apparatus, to be appraised by two or more competent persons, to be designated by him, and the said appraisal may be increased by the assessor if, in his judgment, the same is too low, and the penal sum of said bond must be equal to such appraised value. This is in addition to the distiller's bond required by section 7, and a substitute for the ownership in fee of the distillery premises; and if the same sureties should be offered upon both bonds, the assessor will see that they are the owners of unencumbered real estate, as aforesaid, sufficient in value to cover their liability upon both bonds. No assessor will (section 17) approve the bond of any distiller until all the requirements of law and the regulations in relation to distilleries have been complied with.

PLAN OF DISTILLERY.

Previous to the approval of his bond, every person intending to engage in the business of a distiller must, under the direction of the assessor, cause to be made an accurate plan and description in triplicate of the distillery and distilling apparatus, as provided in section 9. Such plan must be on good paper, fifteen by twenty inches in size, with a margin of at least one inch on each side of the drawing; and where the distillery or distilling apparatus occupies more than one floor or story, each floor or story should be represented on a separate sheet. The assessor must by personal examination test the accuracy of such plan when made, and none but competent draughtsmen should be employed to make it.

After such plan is made, no alteration can be made in such distillery or distilling apparatus without the written consent of the assessor, and such alteration must be shown by a supplemental plan and description, which should also be made in triplicate like the original. One of said plans is to be kept displayed in some conspicuous place in the distillery, one kept by the assessor, and one transmitted by him to the Commissioner of Internal Revenue, rolled and not folded; and any supplemental plan will be disposed of in the same manner. The accuracy of every plan must be verified by the assessor, the draughtsman, and
102 the distiller; and the assessor will note a reference to such supplemental plan on the copy in his possession, and on that of the distiller, and send a copy of such memorandum, with such supplemental plan, to the Commissioner.

SURVEY.

The survey required by section 10 is to be made of every distillery registered, or intended to be registered, for the production of spirits, and of every still or distilling apparatus hereafter set up. The object is to determine the true producing capacity of each distillery, i. e., the quantity of spirits which may be produced in such distillery in twenty-four hours. This will, of course, depend upon the power to be used; the capacity of the still or stills; the mashing and fermenting capacity; and the fermenting period. In addition to this the report should state the aggregate mashing and fermenting capacity in bushels or gallons, i. e., the number of bushels of grain or gallons of molasses which may be mashed and fermented in twenty-four hours. As this is one of the tests by which the amount of tax due is to be determined, it should be carefully and correctly made. The report should be immediately forwarded to the Commissioner, who, if he shall at any time be satisfied

that it is incorrect or needs revision, may direct a new survey to be made.

CONSTRUCTION OF DISTILLERIES.

The door of the furnace of every still or boiler used in any distillery (section 17) must be so constructed that it may be securely fastened and locked. This must be so done that the Government locks may be applied, and so as to effectually prevent the doors from being opened, or the fires lighted in the furnace when locked.

The fermenting-tubs must be so placed as to be easily accessible to any officer, and must each have painted thereon in oil colors its cubic contents in gallons, with the number of the tub, which should correspond with that given in the notice and on the plan. There must be a clear space of not less than one foot around every wood still, and not less than two feet around every doubler and worm tank. The doubler and worm tanks are to be elevated not less than one foot from the floor. Every fixed pipe, except those used only for the conveyance of water or of spent mash or beer, must be so placed as to be capable of being examined for its whole length, and must be painted and kept painted as follows: Pipes for the conveyance of mash or beer, of a red color; for the conveyance of low wines back into still or doubler, blue; for the conveyance of spirits, black; for the conveyance of water, white; and they must be designated by these colors on the plan.

LOCKS AND SEALS.

All locks and seals required by law will be designated by the Commissioner of Internal Revenue, and are to be procured of the collector of the proper district, at the expense of the distiller, except the locks for the closing of the doors of the furnaces of the stills and boilers, which will be furnished to the assessors.

103 RECEIVING CISTERNS.

Every distiller (section 16) is required to erect two or more receiving cisterns in a room or building used for that purpose, and for no other, for each distillery. Each of these cisterns must be of sufficient capacity to hold all the spirits distilled during the day of twenty-four hours. These cisterns must be so constructed as to leave an open space of at least three feet between the top and the roof or floor above, and a space of not less than eighteen inches between the bottom and the floor below, and they must be separated so that the officer may pass around them; and the pipes or other apparatus by which the cisterns are connected with the outlet of the stills, boilers, or other vessels, must be so constructed as to be always exposed to the view of the officer, and so as to prevent the abstraction of spirits while passing from the outlet of the worm or condenser back to the still or doubler or forward to the receiving cistern.

SIGNS, FENCES, AND GATES.

Every person engaged in distilling or rectifying spirits, and every wholesale liquor-dealer or compounder of spirits, is required (section 18) to place and keep conspicuously on the outside of his distillery, rectify-

ing establishment, or place of business a sign in plain and legible letters, not less than three inches in length, painted in oil colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier, wholesale dealer, or compounder, with the words, "registered distillery," "rectifier of spirits," "wholesale liquor-dealer," or "compounder of liquors," as the case may be. No fence or wall of a height greater than five feet can be allowed around the premises of any distillery so as to prevent easy and immediate access thereto. Every distiller must furnish to the assessor of the district as many keys to the doors and gates of the distillery as may be required by the assessor from time to time; and the distillery must always be kept accessible to any officer or other person having such key.

COMMENCEMENT OF WORK.

Every distiller, at the hour of twelve meridian of the third day after that on which his bond is approved by the assessor, will be deemed to have commenced and thereafter to be continuously engaged in the production of distilled spirits in his distillery, except in the intervals when he shall have suspended work, as provided in section 22.

SUNDAYS.

No malt, corn, grain, or other material (section 35) can lawfully be mashed, nor any wash, wort, or beer brewed or made, nor any still used by a distiller at any time between the hour of eleven in the afternoon of Saturday and one in the forenoon of the next succeeding Monday, under penalty of one thousand dollars for each offence.

104 CAPACITY, REDUCTION OF.

Any distiller desiring to reduce the producing capacity of his distillery must give notice of such intention in writing to the assessor, stating the quantity of spirits which he desires thereafter to manufacture every twenty-four hours; and thereupon the assessor is required, at the expense of the distiller, to reduce and limit the producing capacity of the distillery to the quantity stated in his notice, by placing upon a sufficient number of tubs close-fitting covers, securely fastened by nails, seals, and otherwise, so as to prevent the use of such tubs without removing said covers or breaking said seals; and whenever he shall be of opinion that other precautions are necessary he will report the case to the Commissioner of Internal Revenue for instructions.

OFFICERS' RIGHT OF ENTRY.

Any revenue officer (section 32) may at all times, as well by night as by day, enter any distillery or building or place used for the business of distilling or in connection therewith for storage or other purposes; and if not admitted upon demand, having declared his name and office, he may break open any doors or windows, or break through any of the walls of such premises necessary to be broken to enable him to enter. Any officer (section 31) may require the water in any worm-tub to be drawn off, and the tub and worm cleansed at any time when the still is not at work, and the water must be kept out of the worm-tub for two hours, or until the officer has finished his examination.

SUSPENDING WORK.

Any distiller desiring to suspend work (section 22) must give notice in writing to the assistant assessor, stating when he will suspend work. On the day mentioned the assistant assessor will, at the expense of the distiller, proceed to fasten securely every door of every furnace, still, or boiler in said distillery, by securely locking the same, so that they cannot be opened or any fire lighted in such furnace. Such notice must be immediately reported to the assessor, and also the action taken thereon, and such notice and report must be transmitted to the Commissioner of Internal Revenue. No distiller can carry on the business of a distiller after the time stated in such notice until he shall have given another notice in writing to the assessor, stating the time when he will resume work, at which time the assistant assessor must attend and remove the locks and other fastenings, which action must be immediately reported to the assessor and by him to the Commissioner.

FERMENTING-TUBS TO BE EMPTIED.

At the end of the fermenting period every fermenting-tub must be emptied and remain empty twenty-four hours.

105 SPIRITS TO PASS DIRECTLY FROM STILL TO RECEIVING CISTERN.

The storekeeper will see that all spirits manufactured each day are conveyed into one of the receiving cisterns on the same day. These cisterns, and the room containing them, must be in charge of the storekeeper, and under his lock and seal. In no case will he permit the distiller, or any person interested or employed in the distillery, to have access to the keys, or handle or use them.

SPIRITS DRAWN FROM CISTERN.

On or before the third day after the spirits are conveyed into the receiving cistern, they must be drawn off into casks, each of not less capacity than twenty gallons. This must be done under the direct oversight of the gauger and in the presence of the storekeeper, and the spirits removed directly to the distillery warehouse. On special application to the assessor or assistant assessor, the spirits may be drawn off from the cisterns, under the supervision of the gauger, at any time previous to the third day; but the storekeeper must also be present and the spirits removed directly to the warehouse.

GAUGING, MARKING, AND STAMPING.

When drawn into casks, the spirits must be gauged and proved by the gauger himself with his own hands, and in no case can he deputize another person to do it for him. When gauged and proved the gauger will mark with a cutting or branding iron upon the bung-stave of each cask the number of wine-gallons and the number of proof-gallons contained therein, with the proof, and the gauger will, in the presence of the storekeeper, place upon the head of each cask the distillery warehouse stamp, and also cut or burn upon the head of each barrel the serial number of the barrel. Until such stamps are provided,

the gauger will, in place of the stamp, mark upon the head of each cask with a stencil-plate, in blacking or ink, as follows:

Distillery warehouse of ———, ——— district of ———, ——, 186–. Cask No. ——; contents, —— proof-gallons.

———— ————,
U. S. Gauger.

properly filling said blanks.

The serial number for every distillery must begin with number one, (No. 1,) with the first cask deposited, and continue the series until the last day of the year, commencing a new series on the first day of January in each year thereafter, and no two or more casks warehoused at the same distillery may be marked with the same number.

DISTILLER TO PROVIDE WAREHOUSE.

Every distiller must provide at his own expense a warehouse suitable for the storage of distilled spirits, which must be situated on and constitute a part of his distillery premises. No dwelling-house
106 can be used for such purpose, and no door, window, or other opening can be made or permitted in the walls of such warehouse leading into the distillery, or into any other room or building. No spirits can be stored in such distillery except those manufactured by the distiller providing it. A portion of the distillery may be used for this purpose, but in such case it must be separated from the distillery by a solid brick or plank partition; and collectors will, when such warehouse is applied for, make careful examination as to the sufficiency of the division walls, but the entrance to such room must be from the street or yard. If the distiller elects, such warehouse may be a separate building, but it must be upon the premises actually occupied for the distillery. It must be a portion of the distillery, adjoining the distillery building, or within or adjoining the distillery yard.

Every distiller will make application in writing to the collector of the district, stating fully the precise location, size, description, and construction of the room or building desired for such warehouse, specifying its location upon or by reference to the plan of the distillery, and upon receipt of such application the collector will, by himself or one of his deputies, make a full and careful examination thereof, and, if the same is approved by him, will transmit said application to the Commissioner of Internal Revenue, with his report thereon, for his approval, stating the estimated storage capacity of such warehouse, and when approved by the Commissioner a storekeeper will be assigned to such warehouse. Such warehouse must be established for each distillery before any spirits are distilled, and all expenses connected with such warehouse, except the salary of the storekeeper, must be paid by the distiller.

STOREKEEPERS.

Storekeepers will be appointed by the Secretary of the Treasury, (section 52,) one or more of whom will be assigned by the Commissioner of Internal Revenue to every warehouse. The storekeeper assigned to any distillery warehouse will (section 21) also have charge of the distillery connected therewith. Any storekeeper may be transferred by the Commissioner of Internal Revenue or by the supervisor of the district from one warehouse to any other. Storekeepers cannot engage in any other business while in the service of the United States without the written permission of the Commissioner of Internal Revenue. In case of the

absence of the storekeeper from sickness or other cause, the collector having control of the warehouse may designate some person to have temporary charge of such warehouse, who will have all the powers and be subject to all the liabilities of a storekeeper while so acting.

The storekeeper will keep the warehouse-book on Form 101, and make daily returns in duplicate (section 52) to the collector and Commissioner, and triplicate monthly reports to the Commissioner, the assessor, and collector, and, as having charge of the distillery, will also keep the book required by section 21 on Form 100. And no material can be used
107 in any distillery for making mash, wort, or beer, or for the production of spirits, nor can any spirits be removed in the absence of the storekeeper or person designated to act as such. The book on Form 100 must be furnished to the storekeeper by the distiller.

ENTRY FOR WAREHOUSING.

All spirits when drawn from the receiving cisterns must be immediately removed to the distillery warehouse, and on the first, eleventh, and twenty-first days of each month, or within five days thereafter, the distiller or owner must enter the same with the collector of the district for deposit in such warehouse. The entry must be made and signed by the distiller or owner of the spirits in the following form:

Entry for deposit in distillery warehouse.

Entry of distilled spirits deposited by ——— ——— in distillery warehouse No. — in the ——— district, State of ————, during the ten days ending on the ——— day of ———, A. D. 186–, distilled by ——— ———.

Kind of spirits.	Date of deposit.	Number of casks.	Wine-gallons.	Proof-gallons.	Serial numbers, casks.	Serial numbers, stamps.	Amount of tax.

Dated at ————, 186–.

(Signed) ——— ———.

STATE OF ———, *County of* ———, *ss:*

Personally appearing ——— ———, made oath that the foregoing statement by him subscribed is in all respects correct and true.

Before me,

———,

Collector —— *District* ———.

Dated ———, ———, 186–.

The entry will be made in triplicate, one to be retained by the collector, one sent with the duplicate of the bond to the Commissioner of Internal Revenue, and the other sent to the storekeeper in charge of the warehouse; and at the time of making said entry the distiller will give bond in duplicate on Form No. 80, which is hereby prescribed.

108 CUSTODY OF WAREHOUSE.

The storekeeper will have charge of the warehouse to which he may

be assigned, under direction of the collector controlling the same. The warehouse will be in the joint custody of the storekeeper and the proprietor thereof, and kept securely locked. The storekeeper will retain the key of the Government lock, and will not permit the same at any time to go into the possession of such proprietor, and the warehouse must at no time be unlocked or remain open unless in the presence of the storekeeper.

WITHDRAWAL OF SPIRITS FROM WAREHOUSE.

Spirits may be withdrawn from warehouse on payment of the tax on making with the collector of the district an entry for withdrawal in duplicate, as follows:

Entry for withdrawal of spirits from warehouse—tax paid.

Entry of distilled spirits to be withdrawn on payment of tax from distillery warehouse No. ——, by ——— ———. Entered for deposit on the —— day of ———, A. D. 186–, by ——— ———, in said warehouse.

Kind of spirits.	Number of casks.	Wine-gallons	Proof-gallons.	Serial numbers, barrels.	Serial numbers, stamps.	Amount of tax.	For what purpose withdrawn.

Dated at ——— ———, 186–.
(Signed) ——— ———.

STATE OF ———, *County of*———, *ss:*

Personally appearing ——— ———, made oath that the foregoing statement by him subscribed is in all respects correct and true.

Before me,

———— ————,
Collector ——— *District* ———.

Dated ——— ——, A. D. 186–.

On the payment of the tax the collector will indorse upon the back of a copy of said entry an order to the storekeeper in charge of
109 the warehouse, for the delivery of the spirits specified in the entry. The collector will place one of said entries on file in his office, and transmit the other to the Commissioner of Internal Revenue.

TAX-PAID STAMPS.

Whenever an order is received from the collector for the removal from a distillery warehouse of any spirits on which the tax has been paid, the gauger, by whom the same is gauged and inspected, will, in presence of the storekeeper, place upon the head of each cask the tax-paid stamps in such manner as to cover no portion of any brand or mark prescribed by law already placed thereon; and will also, with a branding-iron, burn upon each cask the name of the distiller, the district, date of payment of tax, number of proof-gallons, and the number of the stamp. When such cask is emptied, such brand must be

cancelled, by cutting or burning a line across said mark or brand, in such manner as not to destroy its legibility.

Until such stamps are provided, the gauger will brand each cask as above required, omitting the number of the stamp, and mark upon the cask with a stencil-plate:

Withdrawn from distillery warehouse No. ———, 186–, ——— collection district ———. Tax paid ——— ———.

———— ————,
U. S. Gauger.

GAUGERS.

One or more internal-revenue gaugers will be appointed (section 53) in every district where it may be necessary, who are to be sworn and give bond in not less than five thousand dollars for the faithful discharge of their duties. Gaugers will inspect, brand, and stamp all spirits required by law to be inspected, and all spirits which have been inspected, when directed so to do by the collector. No gauger can be appointed a storekeeper, nor can he deputize or allow another person to act for him. Returns of inspections are to be made daily, in duplicate, to the assessor and collector, containing a true account, in detail, on Form 59.

The fees of gaugers will be at the rates at present prescribed until otherwise ordered, and are to be paid by the distiller or owner of the spirits to the collector of the district, to be paid over by him to the gaugers monthly; but the aggregate monthly fees paid to any gauger can in no case exceed the rate of three thousand dollars per annum. Collectors will, on the first day of each month, pay to the gaugers, out of the aggregate sum so received, for the amount of work done by each, but not exceeding in any case two hundred and fifty dollars for any one month.

110 DISTILLERS OF BRANDY FROM FRUIT.

Distillers of brandy from apples, peaches, or grapes, exclusively, are subject to the same taxes and rates of tax as other distillers. They must register their stills, give the notice, and file the bond required of other distillers, but are exempted from the additional requirements imposed upon other distillers who are not the owners of the fee of the distillery premises, and will not be required to furnish the plan required by section 9. The survey must be made as required by section 10. They will be held subject to all the requirements of the law, as to the assessment, collection, or ascertainment of the tax due, and providing for the keeping of books, and for returns, except that instead of making returns tri-monthly, they will make return on Form 15, on the first day of each and every month, or within five days thereafter, and the tax on the spirits distilled by them during the period embraced in their returns must be paid at the time of making their return. When stamps shall be provided, they must be affixed, as provided in other cases, and the tax-paid stamp must be affixed by the gauger before the spirits are removed from the distillery; and until stamps are furnished the spirits must be inspected and branded or marked, as in other cases, before the same are removed from the distillery.

They will not be required to provide a bonded warehouse, nor to remove the spirits produced by them from the distillery to a bonded

warehouse, nor to erect receiving cisterns in the distillery. They will be exempt from any penalty for non-compliance with any of the provisions of section 17; and also the provisions of section 22, in relation to suspending work; nor will they be subject to the per diem capacity tax imposed by section 13, after the distillery is closed for the season.

DISTILLERS TO KEEP BOOKS.

Every distiller (section 19) is required to make true and exact entry daily, in books to be kept for that purpose, in the form and manner set forth in Forms 12, 13, 25, and 28, which forms are hereby prescribed, of all matters therein contained; and to render an account in duplicate on Form 14, taken from such books on the first, eleventh, and twenty-first days of each month, or within five days thereafter, to the assistant assessor. No materials of a kind for which a special column is provided in Form 13 should be entered under the head of other materials; and in Form 12 every kind of material purchased must be specified.

Each account must be verified under oath or affirmation by the owner, agent, or superintendent of the distillery. The oath of a clerk or other employee is not sufficient.

Upon the receipt of the return, the assistant assessor should satisfy himself, by personal examination of the books and premises, of the accuracy of the entries made, and will then transmit the same to the assessor. On the receipt of the distiller's first return in each month, it will be the duty of the assessor to inquire and determine
111 whether the distiller has accounted in his returns for the preceding month for all the spirits produced by him. In determining the quantity of materials used, which is made an essential element in ascertaining the quantity of spirits produced, forty-five gallons of mash or beer brewed or fermented from grain is to represent one bushel of grain; and seven gallons, brewed or fermented from molasses, represent one gallon of molasses. The provisions of section 20 are not, however, exclusive, but the assessor will adopt any additional means in his power to test the accuracy of the returns; and while the whole amount to be accounted for cannot be less than eighty per cent. of the producing capacity of the distillery as determined by the act, it may and should exceed that amount if more is produced.

ASSISTANCE TO BE FURNISHED.

On demand of any revenue officer (section 33) every distiller, rectifier, or compounder of spirits must furnish strong, safe, and convenient ladders, and supply all assistance, lights, tools, staging, or other things necessary for inspecting the premises, stock, tools, and apparatus belonging to such person, and open all doors, and open for examination all boxes, packages, casks, barrels, and other vessels not under the control of a revenue officer in charge.

RECTIFIED SPIRITS.

Any person (section 59) who rectifies, purifies, or refines distilled spirits or wines by any process, and every wholesale or retail liquor-dealer or compounder of liquors who has in his possession any still or leach-tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits, shall be regarded as a rectifier.

Rectifiers rectifying two hundred barrels or less per annum must pay

a special tax of two hundred dollars, and fifty cents for each barrel in excess of two hundred barrels.

The payment of the special tax as a rectifier or compounder of liquors does not relieve any person from the payment of the special tax as a wholesale dealer on account of the sales of spirits, whether the same be of his own rectification or compounding, or otherwise.

Rectifiers having or using any still or distilling apparatus must register the same, as provided in section 5, and must give the notice required by section 6. Every rectifier, wholesale liquor-dealer, or compounder of liquors must provide himself with and keep the book (Form 52) which is hereby prescribed. The term wholesale liquor-dealer is here used in its popular sense, and includes all who sell spirits by the cask or barrel or other large package or quantity; and every such book must be, at all times, kept in some public or open place on the premises of such rectifier, wholesale dealer or compounder of liquors, respectively, for inspection; and any revenue officer may examine
112 such books, and take abstracts therefrom. Such book may be preserved, and no part thereof, or any entry therein, can be cancelled, altered, obliterated, or destroyed.

Section 46 declares it to be unlawful for any rectifier, compounder of liquors, wholesale or retail liquor-dealer, to purchase or receive distilled spirits in quantities exceeding twenty gallons from any person not an authorized distiller, rectifier, liquor dealer, or compounder, except at judicial sales, or sales by an authorized auctioneer.

Under the provisions of section 59 rectifiers are required to make monthly returns on Form 45 of all matters therein contained, but this is not a substitute for, nor does it relieve them from, monthly returns of their sales as dealers.

RECTIFIERS AND DEALERS' STAMP.

Any package of rectified spirits, filled on the premises of any rectifier for shipment, sale, or delivery, must be gauged and inspected, and the gauger will place thereon the stamp required by law. Until such stamps are provided, the gauger will mark with a stencil-plate upon each cask or package the name of the rectifier, number of district, the State, date, number of proof-gallons, with his name and style of office.

Any package of distilled spirits, filled as aforesaid on the premises of any dealer in liquors, who sells by the cask or barrel, or other large package or quantity, or of any compounder of liquors, must also be gauged and inspected, and the gauger will affix thereto the wholesale liquor-dealer's stamp; and until such stamp shall be provided, the gauger will mark or brand said barrels with the number of the district, the State, name of the dealer or compounder, date, and number of proof-gallons, with his own name and style of office.

CHANGE OF PACKAGE.

When any distilled spirits are drawn from any cask or other package, and placed in any other cask or package, containing not less than ten gallons, and intended for sale, they must be again inspected and gauged, and the cask or package into which it is so transferred marked or branded. Such mark or brand must state the kind and proof of the spirits; the particular name of such spirits, as known to the trade; the name and place of business of the rectifier, dealer or compounder, as the case may be;

and if such spirits have not been rectified or compounded, the name of the distiller; the distillery where produced; serial number of the original package, together with the name of the gauger; the time and place of inspection.

COMPOUNDERS OF LIQUORS.

Any person who, without rectifying, purifying, or refining spirits, shall, by mixing such spirits, wine, or other liquor with any materials, manufacture any spurious, imitation, or compound liquors, for sale, under any name, shall be regarded as a compounder of liquors, and is liable to a special tax of twenty-five dollars. The mere reducing of the proof of spirits, by adding water, does not make the person so doing a compounder. The mixing of different qualities or kinds of spirits renders the person so doing liable as a compounder.

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MANUFACTURERS OF STILLS.

Any person who manufactures any still or worm to be used in distilling is to be deemed a manufacturer of stills, and pay a special tax of fifty dollars, and, in addition thereto, twenty dollars for each still or worm for distilling made by him; i. e., twenty dollars for each still and twenty dollars for each worm.

Any person manufacturing any still, boiler, or other vessel to be used for the purpose of distilling, must, before the same is removed from the place of manufacture, notify, in writing, the assessor of the district in which such still, boiler, or other vessel is to be set up, by whom it is to be used; its capacity; and the time when the same is to be removed from the place of manufacture.

No such still or boiler can be set up without the permit of such assessor for that purpose.

STOCK ON HAND.

Section 57 provides for a return and account of all spirits owned or possessed by any person, exceeding in quantity fifty gallons, which are thereupon to be gauged and proved, and the stamps for stock on hand affixed to each package containing five wine-gallons or more. As the affixing of the stamp is the essential means of identification provided, such returns will not be required until such stamps are provided, when full instructions will be issued.

COLLECTORS' AND ASSESSORS' ACCOUNTS.

Full instructions as to the manner in which collectors and assessors will keep the accounts, required to be kept under the provisions of the act, will be furnished in another form.

NO DISTILLERY ALLOWED TO RUN WITHOUT COMPLIANCE WITH REGULATIONS.

Under no circumstances must a distillery be allowed to run until all the requirements of the law and these regulations have been complied with; and any distillery found running without such compliance must be immediately stopped.

REVENUE OFFICERS NOT TO BE INTERESTED IN DISTILLING, &c.

No internal revenue officer can be interested, directly or indirectly, in the manufacture of tobacco, snuff, or cigars, or in the production, rectification, or redistillation of distilled spirits, under the penalties imposed by section 97.

114 SPIRITS IN BOND.

All spirits in bond, at the time of the passage of the act, must be withdrawn, and the tax paid within nine months from the passage of the act, and the casks or packages must be marked and branded, or stamped as hereinbefore provided in case of spirits removed from distillery warehouse; and all spirits not removed within the nine months will be forfeited and sold, or disposed of in manner to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

DISCONTINUANCE OF WAREHOUSES.

Whenever the Commissioner of Internal Revenue shall be of opinion that any warehouse is unsafe or unfit for use, or the merchandise therein liable to loss or great wastage, he may discontinue such warehouse, and require the merchandise therein to be transferred to such other warehouse as he may designate, and within a time to be prescribed by him, at the expense of the owner of the merchandise. If such transfer is not made, or such expense not paid by the owner, the merchandise will be seized and sold by the collector as upon distraint.

E. A. ROLLINS, *Commissioner.*

115 *Series* 4, *No.* 8.—*United States internal revenue.—Regulations concerning taxes on tobacco, snuff, and cigars, under the act of July* 20, 1868.—*August* 1, 1868.—*Washington: Government Printing Office*, 1868.

NOTE.—The instructions heretofore published as No. 8, treating "of the exemption of manufactured articles under the act of July 13, 1866," having become obsolete, that number (8) is now appropriated to designate this pamphlet.

116 Series 4, No. 8.—Regulations concerning taxes on tobacco, snuff, and cigars.

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, August 1, 1868.

I. TOBACCO AND SNUFF.

SPECIAL TAXES.

By the act of July 20, 1868, the following special taxes are imposed:

Dealers in leaf tobacco.

From the passage of the act, a special tax is imposed upon all dealers in leaf tobacco, graduated according to the amount of annual sales.

When the sales do not exceed ten thousand dollars, the special tax is twenty-five dollars, and for every one thousand dollars in excess of ten thousand dollars, two dollars additional. Wholesale dealers, tobacconists, and manufacturers of tobacco, snuff, and cigars are not exempted from this tax if they sell leaf tobacco.

Dealers in manufactured tobacco.

Every person whose business it is to sell or offer for sale manufactured tobacco, snuff, or cigars, is required to pay a special tax graduated as follows: When his annual sales exceed one hundred dollars and do not exceed one thousand dollars, a tax of five dollars; and on each one thousand dollars in excess of one thousand dollars, an additional tax of two dollars.

Retail dealers, keepers of hotels, inns, taverns, drinking or eating houses, are liable to this tax in addition to other special taxes if they sell tobacco, snuff, or cigars to an amount exceeding one hun-
117 dred dollars. But a manufacturer of tobacco is not liable to this tax for selling the products of his own manufacture.

Manufacturers of tobacco or snuff.

Manufacturers of tobacco or snuff are required to pay a special tax of ten dollars, and, in addition thereto, two dollars for each one thousand dollars in excess of five thousand dollars of the penal sum in which they are required by law to give bonds.

A tobacco manufacturer is defined to be one whose business it is to manufacture tobacco or snuff for himself, or who employs others to manufacture tobacco or snuff, whether such manufacture shall be by cutting, pressing, grinding, crushing, or rubbing of any leaf or raw tobacco, or otherwise preparing raw or leaf tobacco, or manufactured or partially manufactured tobacco or snuff, or the putting up for use or consumption of scraps, waste, clippings, stems, or deposits of tobacco, resulting from any process of handling tobacco.

MANUFACTURER'S BOND.

Every person before going on with the manufacture of tobacco or snuff must file with the collector of his district a new bond, (Form 40,) in accordance with the provisions of section 63.

It is made the duty of every manufacturer of tobacco, without previous demand therefor, to furnish in duplicate to the assessor or assistant assessor a statement (Form 36) accurately setting forth the place where his manufacture is carried on, the number and kind of machines, &c., kept for use, the kind and quality of his products, &c. In many cases manufacturers may neglect or delay to do this. Every assessor will see that these statements are immediately furnished, as the amount of special tax to which any manufacturer of tobacco or snuff is liable depends upon the penal sum of his bond, and as severe penalties are imposed upon any person manufacturing tobacco or snuff without first giving bond.

The assessor will transmit to the collector one copy of each statement as soon as it is received by him. From these statements the collector will determine whether the bonds offered by manufacturers are in conformity with the provisions of the law.

Before approving any bond the collector should require affidavits of

the sureties to be made on Form 33, and filed in his office with the bond. The penal sum of the bond of any manufacturer of tobacco or snuff is fixed by law at a minimum of $2,000, and is to be increased as follows:

For each cutting machine kept for use	$3,000 00
For each screw-press used for plug or pressed tobacco	1,000 00
For each hydraulic press kept for use	5,000 00
For each snuff-mill kept for use	1,000 00
For each hand or other mill, machine, &c	1,000 00

The amount of any bond may be increased from time to time,
118 and additional sureties required by collectors under the instructions of the Commissioner of Internal Revenue.

The collector is required to issue to the manufacturer a certificate (Form 41) setting forth the kind and number of machines, presses, &c., for which the bond has been given, which certificate must be posted in a conspicuous place in the factory.

EXCESS OF SALES AND MODE OF RETURNING THE SAME.

By virtue of the authority given to the Commissioner of Internal Revenue by section 60, it is hereby prescribed that dealers in leaf tobacco whose annual sales exceed $10,000, dealers in tobacco whose annual sales exceed $1,000, and manufacturers of cigars whose annual sales exceed $5,000, shall, on or before the tenth day of each month, make a return of the entire amount of their sales for the preceding month; and the tax on the excess of such sales above the given amount, as prescribed by law, will be assessed and returned for collection on or before the last day of the month. Whenever such sales are more or less than one thousand dollars, or an even number of thousands, the fractional part of one thousand will be carried to the sales of the succeeding month.

Manufacturers of tobacco and snuff who also manufacture cigars will be required to pay a special tax as cigar manufacturers.

The special tax imposed upon manufacturers of tobacco being graduated by the amount of the penal sum of the bonds of such manufacturers, it will be the duty of the assessor, as soon as the said bonds are filed with the collector, to assess the additional tax of $2 for each $1,000 in excess of $5,000 of the amount of the penal sums of said bonds, and return the same for collection. And whenever any manufacturer of tobacco shall add to the number of his cutting machines, pumps, hydraulic or hand presses, snuff-mills, hand-mills, or other mills or machines, so as to require an increase of the amount of his bond, it will be the duty of the assessor to assess such increase at the rate of $2 for every $1,000 of such increase, and return the same to the collector.

PACKAGES.

All manufactured tobacco, snuff, and cigars, from and after the passage of the law, are required, according to the provisions of section 62, to be put up and prepared by the manufacturer for sale or consumption in packages of the following descriptions, and in no other manner, viz:

1. Cavendish, plug, and twist tobacco, in wooden packages not exceeding two hundred pounds, net weight.

2. All fine-cut chewing tobacco, in packages containing one-half, one, two, four, eight, and sixteen ounces, or in wooden packages containing ten, twenty, forty, and sixty pounds each.

3. Smoking tobacco of every description, fine-cut shorts which
119 have passed through a riddle of thirty-six meshes to the square inch, and all refuse scraps and sweepings of tobacco, in packages containing two, four, eight, and sixteen ounces each.

4. All snuff in packages containing one, two, four, eight, and sixteen ounces; or in bladders containing not exceeding ten pounds each; or in jars not exceeding twenty pounds each.

5. All kinds of tobacco, not otherwise provided for, in packages containing one-half, one, two, four, eight, and sixteen ounces each.

Every wooden package containing tobacco is required to have printed or marked thereon the manufacturer's name and place of manufacture, or the proprietor's name and his trade-mark, and the registered number of the manufactory, the gross weight, the tare, and the net weight of tobacco in each package.

And upon every package of tobacco or snuff, whether put up in wooden packages or otherwise, the law requires (sec. 68) that there shall be printed, or securely fixed by pasting thereon a label, the proprietor's or manufacturer's name, the number of the manufactory, and the district and State in which it is situated, together with the following notice:

"NOTICE.—The manufacturer of this tobacco has complied with all the requirements of law; every person is cautioned, under penalties of law, not to use this package again."

MANUFACTURER'S SIGN AND COLLECTOR'S CERTIFICATE.

It will be the duty of every assistant assessor, immediately upon the receipt of this circular, to make a thorough and complete canvass of his division, for the purpose of ascertaining the name of every manufacturer of tobacco and snuff in his division, the street and number where the factory is located, and also to see that every such manufacturer has complied with the requirements of section 64, by placing on the side or end of the building where his manufacturing business is carried on, so that it can be distinctly seen, a sign giving his full name and business; and also to see that every such manufacturer has posted up in a conspicuous place within his manufactory the certificate (Form 41) obtained from the collector.

It will be the duty of the assessor immediately to cause the several tobacco and snuff manufactories in his district to be numbered consecutively, which numbers are not afterwards to be changed. (Section 65.)

RECORDS, ETC.

The attention of assessors is called to the provisions of section 65, requiring records to be kept by assessors and assistant assessors of the name and residence of every person engaged in the manufacture of tobacco and snuff, in which are to be entered all inventories and abstracts of monthly returns, &c.

The Commissioner of Internal Revenue has prescribed blank No. 74 as the form of book to be kept by every manufacturer of tobacco and snuff, and his abstracts or monthly returns are to be made on
120 Form No. 62. These returns are required to be made on or before the 10th day of each and every month, verified by oath or affirmation. (See section 66.)

INVENTORIES.

Attention is also called to the inventory (Form 70) required by sec-

tion 66 of every person now or hereafter engaged in the manufacture of tobacco and snuff. These inventories are to be made on the first day of January by all who are now engaged in the business, and at the time of commencing by all who were not in the business at the passage of the law, and an inventory is required of every one at the time of concluding business. And whenever such an inventory is received by an assistant assessor, he will immediately make a personal examination of the stock, sufficient to satisfy himself of the correctness of the inventory, and to verify the facts before the assessor, for indorsement upon the inventory.

BOOKS TO BE KEPT.

Assessors will also immediately instruct their assistants to see that the provisions of section 76 are complied with in regard to dealers in leaf tobacco, that the proper books are kept, (Form 77,) and that dealers in manufactured tobacco make and return the inventories (Form 75) required by section 78.

RATES OF TAX.

The act imposes but two rates of tax on tobacco, viz: thirty-two and sixteen cents per pound. The higher rate of thirty-two cents per pound is imposed—

1. On all snuff prepared for use, and on all snuff flour sold or removed for use or consumption.
2. On all chewing tobacco, fine-cut, plug, or twist.
3. On all tobacco twisted by hand, or reduced from leaf into a condition to be consumed, or otherwise prepared without the use of any machine or instrument, and without being pressed or sweetened.
4. On all smoking tobacco made from leaf previously stripped, butted, or rolled, or from which a part of the stem has been separated by sifting, stripping, dressing, or other manner, either before, during, or after the process of manufacturing.
5. On all other kinds of manufactured tobacco not otherwise provided for.

The lower rate of sixteen cents per pound is imposed—

1. On all smoking tobacco made exclusively of stems.
2. On all smoking tobacco manufactured with all the stems in and so sold, the leaf not having been previously stripped, butted, or rolled, and no part of the stems having been separated by sifting, stripping, dressing, or in any other manner, either before, during, or after the process of manufacturing.
3. On all fine-cut shorts, the refuse of fine-cut chewing tobacco, 121 which has passed through a riddle of thirty-six meshes to the square inch by process of sifting.
4. On all refuse scraps and sweepings of tobacco.

MANUFACTURED TOBACCO.

As the law requires that all manufactured tobacco hereafter shall be put up in packages of certain descriptions and limitations, and as the tax is imposed only upon manufactured tobacco and not upon raw or leaf tobacco, it is important to determine what is "manufactured tobacco" within the meaning of this law. Section 61 imposes a tax of thirty-two cents per pound on all tobacco twisted by hand, or reduced from leaf into a condition to be consumed, or otherwise prepared with-

out the use of any machine or instrument, and without being pressed or sweetened.

The law does not require that there shall be any radical change in the natural leaf, or any extended mode of preparation, or any process of reduction which cannot be performed by hand and without the aid of any machine or instrument. Therefore all tobacco twisted by hand, or prepared by any process, however simple, for consumption or use, must be packed as prescribed by law for manufactured tobacco, and the tax of thirty-two cents per pound paid thereon.

The law imposes "on all refuse scraps and sweepings of tobacco a tax of sixteen cents per pound." Therefore all scraps, waste, clippings, &c., put up for general sale and thrown upon the market for indiscriminate purchasers for use or consumption, will be regarded as manufactured tobacco within the meaning and intent of the law, and will be required to be packed as therein described, and the tax of sixteen cents per pound paid thereon. And any person purchasing scraps, waste, clippings, stems, sweepings, or broken and fragmentary tobacco, and manipulating the same by any process of cutting, pressing, grinding, crushing, rubbing, screening, or any other process, or putting up the same for use or consumption, will be held to be a manufacturer of tobacco, and liable both to the special tax and to the specific tax payable by stamps. And any person who purchases raw or leaf tobacco, and in any way changes its condition, and puts it up for use or consumption, will be held liable to both of the taxes named above.

SMOKING TOBACCO.

The rate of tax upon smoking tobacco is made to depend upon the process of manufacture. Any process by which the natural leaf is made into smoking tobacco which does not involve the stripping, butting, or rolling of the stems, or the separation of the stems from the leaf by sifting, stripping, dressing, or in any other manner, either before, during, or after the process of manufacturing, may be employed, and the tobacco produced by such process will be liable to the tax of sixteen cents.

But if the stems are stripped from the leaf, or butted, or rolled, or if any portion of the stems are removed before, during, or after the
122 process of manufacture, the tobacco produced by any process involving these conditions will be liable to a tax of thirty-two cents per pound.

TOBACCO IN BOND.

Tobacco bonded prior to July 20, 1868, may be withdrawn for consumption upon the payment of the rates of tax imposed by the new law, and without being repacked; provided in case of smoking, or fine-cut chewing tobacco, or snuff, the withdrawal is made before the first day of January, 1869. All tobacco withdrawn from bond after the above date must be put up in packages and stamped; and all tobacco out of bond, in whose'ever hands held, whether manufactured and sold prior or subsequent to the passage of the act of July 20, 1868, must be packed and stamped before sold or offered for sale. (See section 78.)

Tobacco in bonded warehouses at the time of the passage of the law may at any time be withdrawn or removed for export to a foreign country without payment of tax, and without any change of packages, upon compliance with the rules and regulations of the Secretary of the Treasury in force prior to July 20th, and in accordance with the conditions

of the law then in force, upon an order or permit from the collector in charge of exports at the port of shipment.

REMOVAL OF TOBACCO, ETC., BEFORE STAMPS ARE PREPARED.

Until special revenue stamps for payment of the tax on tobacco, snuff, and cigars are prepared, and prior to the time fixed for their use, manufacturers of tobacco, snuff, and cigars will be required to have all their products properly inspected, branded, or marked by a tobacco inspector before the same are used or removed for consumption or sale, in the same manner as prescribed by former rules and regulations. And all such tobacco and snuff, when removed from the place of manufacture, will become liable to tax according to the new rates, and must be returned upon the first return-day after removal, and the tax assessed and paid as provided in the old law.

STAMPS.

At the end of sixty days from July 20, 1868, or upon such day thereafter, not later than the first day of December next, as the Secretary of the Treasury shall determine, all taxes on tobacco, snuff, and cigars are to be paid by stamps, which are to be affixed to every box, bag, vessel, wrapper, or envelope of any kind containing the same. These stamps are to be affixed, and properly cancelled before any tobacco, snuff, or cigars can be removed from the factory or place where the same are made.

REMOVALS IN BOND.

The law makes no provision for the removal of tobacco in bond without payment of tax, except such tobacco and snuff as are intended for export. When so intended, before any removal can be made,
123 engraved stamps, indicative of such intention, must be affixed to each package of tobacco or snuff. When thus stamped, said goods may, as provided in section 74, be removed in bond from the manufactory, without payment of the tax, to be transported directly to an export bonded warehouse established by the Commissioner of Internal Revenue, at any port of entry in the United States, for the storage of manufactured tobacco and snuff intended for exportation.

Section 73 provides that said goods may be withdrawn from an export bonded warehouse once, and no more, for transportation to, and storage in, an export bonded warehouse at any other port of entry.

The same section also provides that said goods may be withdrawn from warehouse either for immediate export to a foreign country, or after the tax has been paid thereon.

By virtue of the authority conferred by said sections upon the Commissioner of Internal Revenue, the following rules and regulations are prescribed for the deposit in, and withdrawal from, any export bonded warehouse, and the transportation and exportation of manufactured tobacco and snuff. These rules are arranged under the following headings, viz:

I. Mode of transporting goods in bond from the manufactory to an export bonded warehouse.

II. Mode of withdrawing and transporting goods from one port of entry to another.

III. Withdrawal for exportation.

IV. Withdrawal after payment of tax.

I. MODE OF TRANSPORTING GOODS FROM THE MANUFACTORY TO AN EXPORT BONDED WAREHOUSE.

The party desiring to transport manufactured tobacco or snuff from the manufactory to an export bonded warehouse will give notice of his intention to the collector of the district, who will thereupon detail an inspector of tobacco to inspect, weigh, and mark the packages. And it will be his duty to mark upon each package its weight, together with his name, date of inspection, and collection district; and also to affix to each package the proper export stamp. The collector will deliver to the inspector an order in triplicate, on Form A, upon complying with which the inspector will make certificates of his inspections on each copy of the order, and, leaving one copy with the owner of the goods, he will deliver the other copies to the collector. The order and certificate will be as follows, viz:

FORM A.

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
—— *District of* ——, ——, 186–.

SIR: You will proceed to the manufactory of —— ——, at ——, and there inspect, weigh, mark, and stamp, according to law and regulation, the [tobacco or snuff, as the case may be] which the said —— —— desires to transport in bond, and you will make en-
124 tries of your inspections in detail on the certificate hereto appended, and sign, and deliver one copy to the owner of the goods, and the other copies to me.

(Signed) ——,
Collector.

To ——,
Inspector of Tobacco.

——, 186–.

I hereby certify that I have this day inspected, weighed, marked, and stamped, according to law and regulation, the following described merchandise, viz:

Marks and numbers.	No. of packages and contents.	No. of pounds.	Rate of tax.	Amount of tax.	

produced in the manufactory of —— ——, at ——, and that the foregoing entries are true, correct, and complete.

(Signed) ——,
Inspector of Tobacco.

The manufacturer of the goods, upon receiving this certificate, will indorse upon it his entry for transportation, in the following form, viz:

ENTRY FOR TRANSPORTATION.

—— DISTRICT OF THE STATE OF ——,
——, 186–.

The undersigned request — that the merchandise described in the

within certificate of the inspector, now at the manufactory of ———, at ———, may be transported therefrom by the mode of conveyance and routes hereinafter mentioned, to the ——— district of the State of ———, at ———, to be upon its arrival there placed in an export bonded warehouse, situated in said district. The same to be conveyed by ———.

(Signed) ——— ———.

To ——— ———, Esq., *Collector.*

In the blank space after the words "to be conveyed by," the applicant must describe the entire route to be taken, stating, where transportation by land is intended, the name of the railroad or other transportation company to which the goods are first to be delivered; and, when transportation by water is intended, the name of the line or company, and the name of the particular vessel or steamer to which the goods are to be delivered, must be given.

125

PAYMENT FOR STAMPS AND INSPECTORS' FEES.

At the time of filing the foregoing entry with the collector, the applicant is required, by section 74, to pay to the collector the sum of twenty-five cents for each package stamped as required by law.

Each inspector will be entitled to receive from the manufacturer or owner a fee of five cents per package for inspecting, weighing, and marking tobacco or snuff, at the manufactory or in export warehouse, unless otherwise especially prescribed by the Commissioner.

Upon the receipt of the foregoing application or entry, the collector will exact from the applicant a bond, with good and sufficient sureties, in at least double the amount of taxes upon said merchandise, in the following form, viz:

FORM B.

Know all men by these presents that we, ——— ———, ——— ———, as principals, and ——— ———, and ——— ———, as sureties, are held and firmly bound unto the United States of America in the just and full sum of ———$_{100}$ dollars; for the payment of which sum we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at ———, this ——— day of ———, A. D. 186–.

Whereas the above-bounden ——— ———, ——— ———, principals, have made request to ——— ———, esq., collector of the ——— district of the State of ———, for the transportation of the following described merchandise, viz:

Marks and numbers.	No. of packages and contents.	No. of pounds.	Rate of tax.	Amount of tax.	

by means of* ———

*Here insert a full description of the route to be taken, whether by land or water, or partly by land or water, with names of vessels, lines, or railroads.

——————————— from the manufactory of ——— ———, at ———, in the ——— district of the State aforesaid, to ——— ———, esq., collector of the ——— district of the State of ———, at ———,
126 to be by him, upon its arrival there, placed in an export bonded warehouse for the storage of manufactured tobacco and snuff:

Now, therefore, the condition of this obligation is such, that if the whole of the aforesaid merchandise shall be safely delivered to the collector last named, or his successor, at ————, aforesaid, and shall be placed in an export bonded warehouse, within ——— days from the date hereof; and if the said principal obligors herein shall, within ——— days thereafter, produce to the collector first above named, or his successor, the certificate of the last-named collector, or his successor, showing that said merchandise has been duly delivered to him and placed in an export bonded warehouse, as mentioned in the aforesaid request, then this obligation to be void; otherwise to be and remain in full force and virtue.

(Signed) ——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of—
——— ———.
——— ———.

[25-cent stamp.]

RESPONSIBILITY OF BONDSMEN.

Collectors will use the utmost care and scrutiny to ascertain the ample responsibility of the signers of bonds; and when the sufficiency of the sureties is not personally known to the collector, he will require them to justify in the manner prescribed in Form 33. Collectors will observe that sureties are not to be accepted simply because they justify on Form 33. The principal object of that form is to obtain statements which the collector can and is required to investigate, in all cases, in order to determine the truth or falsity of the same; and no bond will be finally accepted until the statements on that form are found to be true, and certified to be so by the collector.

TIME ALLOWED FOR TRANSPORTATION.

The time allowed for transportation must not exceed thirty days, and the time for furnishing or producing proof of delivery of the property, as stipulated, must not exceed fifteen days. Whenever the transportation can be completed in less time than thirty days, the collector will ascertain and fix the time actually and ordinarily required, and fill the blanks accordingly. Thus, if six days are required, the bond should be made for six days, and three days given to furnish proof of delivery. It is specially enjoined upon collectors to give particular attention to this matter. In no case will they allow over thirty days; and when the transportation can be done in less time, they will allow only the time actually required as above stated.

127 WHEN AND HOW TIME MAY BE EXTENDED.

Whenever failures to comply with the stipulation of bonds, in respect to time, shall arise from circumstances beyond the control of the

obligors, an application may be made, through the proper collector, to the Commissioner of Internal Revenue, for an extension of the time, and collectors may, in the mean time, delay to sue on the bond, provided there is ample assurance that no damage or loss shall accrue by reason of such delay.

When a transportation bond is forfeited, the collector should immediately notify the Commissioner of Internal Revenue and the proper United States district attorney of the fact, and request the latter to commence suit on the same forthwith.

COLLECTOR'S CERTIFICATE FOR THE ASSESSOR.

The bond, Form B, having been duly executed and delivered to the collector, he will deliver to the applicant a certificate, indorsed on one copy of Form A, addressed to the assessor of the district, as follows, viz:

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
—— *District of the State of*——, ——, 186–.

I hereby certify that the within-named —— —— has received permission to transport the within-described merchandise to the —— district of the State of ——, for storage in an export bonded warehouse in said district, he having executed and delivered to me a proper transportation bond for that purpose.

(Signed) ——— ———,
Collector.

To ——— ———, Esq.,
Assessor.

This certificate must be presented to the assistant assessor on or before the 10th day of the proper month, in company with the monthly abstract required by section 66, and the assistant assessor must return the certificate to the assessor, in order that he may carefully compare the same with the collector's monthly report of tobacco and snuff in bond.

BILLS OF LADING.

The bond, Form B, having been duly executed and delivered to the collector, the manufacturer will be allowed to ship the goods by the conveyance designated in his entry, and will be required to obtain and deliver to the collector of the district three bills of lading, which will be substantially in the following form, viz:

FORM C.

—— FREIGHT OFFICE, ——, 186–.

Received, from ——— ———, collector of internal revenue for the ——— district of the State of ———, the following described packages, in good order, consigned as marked and numbered in the margin, to be transported in bond for [here give the name of the owner or
128 principal to the bond,] over the line of this road to ——— station, and delivered in like good order [at said station, or to such com-

pany of carriers whose line forms a part of the route, (in which case the name of the company should be stated,) to be forwarded and delivered] unto ——— ———, collector of internal revenue for the —— district of the State of———, or his successor in office, to be stored in an export bonded warehouse in said district, the said [here insert name of owner] paying freight and all charges on said merchandise; and the rate of freight for the transportation of said packages from the place of shipment to ——— shall not exceed —— per ——.

In witness whereof the agent of the said ——— Company hath affirmed to three* bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Marks and numbers.	No. of packages and contents.	Pounds.	Weight.

(Signed) ———— ————,
Freight Agent.

The owner of the goods or principal to the bond must make arrangements for shipment, rate, and payment of freight, and the like details, with the transportation company, and the parties may be allowed to specify in the bill of lading the conditions of their agreement in respect to those matters, but nothing must be incorporated therein which will in any manner impair the right of the Government to hold entire control and custody of the goods, nor impair the obligation of the owner and transportation companies to forward and deliver them to the designated collector of internal revenue.

When the goods are shipped by vessel or steamer, the wording of the above form will be changed to suit the case in that particular.

DISPOSITION OF BILLS OF LADING.

The collector, on receiving the bills of lading, will immediately indorse on each one his certificate setting forth the rate of tax and the amount of tax on the goods described in the bills, and will at once mail one copy to the collector to whom the goods are consigned, and another copy to the Commissioner of Internal Revenue, and will carefully file and preserve the third copy in his office

129 RECEIVING AND STORING GOODS AT PORT OF ENTRY.

It will be the duty of the owner of the goods, or his agent, immediately upon their arrival at the place of destination, to file with the collector to whom they are consigned, an entry of the merchandise in duplicate, in the following form, viz:

*Three bills are required for the use of the Government. The shipper can have additional copies for his own use if he desires.

FORM D.

Entry of merchandise to be stored in the export bonded warehouse at ———, owned by ——— ———, in the ——— district of the State of ———.

Marks and numbers.	No. of packages and contents.	No. of pounds.	Rate of tax.	Amount of tax.	

The said merchandise having been removed from the manufactory carried on by ——— ———, situated in ———, county of ———, and State of ———, being the ——— collection district in said State, under bond given by ——— ———, and dated the ——— day of ———, A. D. 186–, and bill of lading issued by ——— ——— Company, dated the ——— day of ———, 186–.

(Signed) ——— ———.

Dated at ——— ———, 186–.

The merchandise must be described in the foregoing form precisely as described in the bond, Form B.

The collector having appended to the original entry his order to the storekeeper of the proper export bonded warehouse, to receive the goods from the owner or his agent, and store them in said warehouse, will hand the order to the owner or his agent. The order will be in the following form, viz:

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
——— *District of the State of* ———, 186–.

SIR: You are hereby directed to receive the above-described merchandise, and safely store and keep the same in the export bonded warehouse under your charge in this district.

(Signed) ——— ———,
Collector.

To ——— ———,
Storekeeper.

130 This order must be delivered with the goods by the owner or agent to the storekeeper, who will retain the same.

The collector, having selected the proper inspector, will deliver to him an order appended to the duplicate entry to inspect the goods and make report of their condition.

No loss will be allowed for shrinkage in weight of tobacco during transit, or while stored in bond; but where packages are delivered to the storekeeper in good condition, corresponding in numbers, marks, and marked weights with the permit, showing no signs of having been opened or tampered with, the collector will issue his certificate of receipt, and take the warehousing bond for the full number of pounds named in the permit; and when these conditions are complied with, no further inspection at the time of receipt will be required.

In case the tobacco so received is afterwards exported in the original packages, they will be assumed to contain the quantity named in the

permit. If withdrawn for consumption, the tax must be paid on the quantity as originally bonded.

If the packages show any signs of having been opened or tampered with, or if the inspector discovers that the weights are incorrectly marked, he will carefully examine and weigh such packages, mark the true weights on each, enter the same on his certificate, and report the facts to the collector, and in such case the collector will receipt, on Form F, only for the quantities actually received.

The order to the inspector will be as follows, viz:

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
——— *District of* ———, ——— —, 186–.

SIR: You will proceed to the above-described export bonded warehouse, and there inspect, according to regulation, the merchandise described in the above entry, and return to me your report of inspections in detail, on the back hereof, with the storekeeper's receipt for the same, noting changes in weights, if any.

(Signed) ——— ———,
Collector.

To ——— ———,
Inspector of Tobacco.

Upon receiving this order, the inspector will proceed to the warehouse, and, after making the proper inspection, will indorse upon the duplicate entry, Form D, his certificate as follows, viz:

——— DISTRICT OF THE STATE OF ———,
———, ——— —, 186–.

I hereby certify that I have inspected, [*weighed, and marked,] according to law and regulation, the merchandise described in the
131 within entry, now deposited in the export bonded warehouse therein named; that I found the same to be as follows, viz:

Marks and numbers.	No. of packages, and contents.	No. of pounds.	Rate of tax.	Amount of tax.	

and that the foregoing entries are true, correct, and complete.

(Signed) ——— ———,
Inspector of Tobacco.

The storekeeper will then append to the foregoing certificate, on the duplicate form, his certificate as follows, viz:

———, ——— —, 186–.

I hereby certify that I have received the merchandise described in the foregoing certificate of the inspector; that the same has been duly inspected, and is now safely stored in the export warehouse, of which ——— ——— is proprietor, at ———, under my charge.

(Signed) ——— ———,
Storekeeper.

* The words in brackets should be erased if the original weights are correct.

The inspector will immediately deliver the duplicate to the collector, and the storekeeper will make the proper entries on his warehouse record on the day of the receipt and inspection of the goods.

On receipt of the duplicate, Form D, with the certificates thereon of the inspector and storekeeper, the collector will take from the owner or consignee of the merchandise a warehousing bond, Form E, conditioned to pay the taxes on the merchandise so deposited, or to withdraw the same in the manner prescribed by law and regulation. The bond will be in the following form, viz:

FORM E.

Know all men by these presents that we, ——— ———, as principals, and ——— ——— and ——— ———, as sureties, are held and firmly bound unto the United States of America in the sum of ——— dollars, to be paid to the United States; for the payment whereof we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents, as witness our hands and seals, at ———, this —— day of ———, eighteen hundred and sixty ——.

The condition of this obligation is such, that if the above-bounden principals, or either of them, or either of their heirs, executors, administrators, or assigns, shall well and truly pay, or cause to be paid, unto the collector of internal revenue for the ——— district of ———, the amount of taxes due and owing on the following-described goods,
132 [here insert description, as given in the inspector's certificate on Form D,] which were deposited in the export bonded warehouse of ——— ———, at ———, in the ——— district of ———, on the —— day of ———, 186–, or shall, in the mode described by law, withdraw the said goods from the said warehouse, then this obligation is to be void; otherwise to remain in full force and virtue.

——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of—

——— ———.
——— ———.

[25-cent stamp.]

The bond, Form E, having been duly executed and delivered to the collector, he will make out duplicate certificates of the merchandise received, that the same has been inspected, and stating the quantity thereof, and that a proper warehousing bond has been taken for the same; which certificate will be in the following form, viz:

FORM F.

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
——— *District, State of* ———, —— —, 186–.

I hereby certify that the following-described merchandize, viz:

Marks and numbers.	No. of packages, and contents.	No. of pounds.	Rate of tax.	Amount of tax.	

bonded by ——— ———, and consigned under bill of lading, dated —— —, 186–, by ——— ———, collector of the —— district of the State of ———, to the undersigned, has been received, identified, and inspected, and ascertained to be as follows, viz:

Marks and numbers.	No. of packages, and contents.	No. of pounds.	Rate of tax.	Amount of tax.	

and that a proper warehousing bond has been taken for the same.

133 Witness my hand and official seal, at ———, this —— day of ———, 186–.

——— ———,
Collector.

This is to certify that the above certificate of the collector has been presented to me, and that the taxable quantity therein named has been entered in the bonded account of this district.

——— ———,
Assessor.

To ——— ———,
Collector.

The original of this certificate will be personally delivered or mailed by the collector to the assessor of his district, and said assessor, after signing the certificate above appended to the collector's certificate, will mail the same to the collector by whom the goods were consigned under bills of lading.

The duplicate of Form F will, if desired, be delivered by the collector to the owner of the merchandise, or his agent, who will procure the same to be countersigned by the assessor of the district in which the goods are warehoused.

Parties will bear in mind that no bond, Form B, will be cancelled unless Form F is presented to the assessor, and his certificate is thereto appended, as above required.

Collectors will also bear in mind that no bond, Form B, must be cancelled until the original, Form F, is received by them.

SHIPMENTS IN CITY DISTRICTS.

When the manufactory is situated in a district embraced in a port of entry at which an export bonded warehouse is established, and the goods can be transported in one day by carmen or draymen from the manufactory to the export warehouse, no bill of lading will be required. In such cases, the transportation bond having been executed, and the collector's permit for removal, on Form A, having been issued, the manufacturer or shipper will file with the collector having charge of the export warehouse the entry, Form D, as heretofore required; and thereafter the proceedings will be precisely in accordance with the foregoing instructions following Form D, except that the words "and bill

of lading issued by ——— Company," will be left out wherever they occur.

II. MODE OF WITHDRAWING AND TRANSPORTING GOODS FROM ONE PORT OF ENTRY TO ANOTHER PORT OF ENTRY.

The party desiring to withdraw manufactured tobacco or snuff from an export bonded warehouse for transportation to, and storage in, a similar export bonded warehouse at another port of entry, will file with the proper collector of internal revenue an entry of withdrawal for transportation, in duplicate, which will be in the following form, viz:

134 ENTRY OF WITHDRAWAL FOR TRANSPORTATION.

FORM G.

——— DISTRICT, STATE OF ———,
———, ———, 186–.

The undersigned request– that the herein-after described merchandise, now in the export bonded warehouse, owned by ——— ———, situated in ———, county of ———, State of ———, in the ——— district of said State, may be transported therefrom by the mode of conveyance and routes hereinafter mentioned, consigned to ——— ———, esq., collector of the ——— district of the State of ———, at ———, to be by him, upon its arrival, placed in an export bonded warehouse for the storage of manufactured tobacco and snuff, situated in said district, viz:

Marks and numbers.	No. of packages, and contents.	No. of pounds.	Rate of tax.	Amount of tax.

To be conveyed by ———.
(Signed) ——— ———.
To ——— ———, Esq.,
Collector.

[50-cent. stamp.]

The goods will be described in this entry precisely as they were described in the warehousing bond, Form E, and the collector will exact from the applicant a transportation bond like Form B, heretofore prescribed, substituting for the words "from the manufactory" the words "from the export bonded warehouse," which will be designated as Form H.

The instructions heretofore given concerning the description of the routes of conveyance, the sureties to the bond, and the use of Form 33, and the limitation and extension of time allowed for transportation, must be observed here.

TIME ALLOWED FOR TRANSPORTATION.

In case of withdrawal from an export warehouse at a port of entry on the Atlantic coast for transportation in bond to an export warehouse at a port of entry on the Pacific coast, or vice versa, when the shipment is

by way of Cape Horn, nine months will be allowed in which to
135 complete the transportation; but if the shipment is by the Isthmus route, the time allowed will not exceed four months, and thirty days thereafter, in which to furnish the proof of the same.

TRANSFER OF GOODS TO PLACE OF SHIPMENT.

The bond, Form H, having been duly executed and delivered to the collector, the next step will be to transfer the goods from the bonded warehouse to the place of shipment, and obtain the bills of lading. To this end the collector will detail an inspector of tobacco appointed for the purpose, to supervise the transfer, and will deliver to him an order, in duplicate, appended to the entry, Form G, on the storekeeper for the delivery of the goods in the following form, viz:

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
——— *District, State of* ———, ———, 186–.

SIR: You are hereby directed to deliver into the custody of Mr. ——— ——— the above-described merchandise now stored in the export bonded warehouse, owned by ——— ———, and under your charge at ———, the said goods having been bonded by ——— ——— for transportation and delivery to ——— ———, esq., collector of the —— district of the State of ———; and the said inspector, who will deliver you this order, will superintend the transfer of said merchandise to the place of shipment, delivering the same to ———, [here name the company or line, &c.,] and taking therefor three bills of lading signed by the proper agent or officer of said company, which are to be immediately returned to me by said inspector, together with the duplicate of this order.

(Signed) ——— ———,
Collector.

To Mr. ——— ———,
Storekeeper.

The inspector, on receiving the goods from the storekeeper, will append his receipt for the same to one copy of Form G, and deliver it to the storekeeper, who will retain it as his voucher, making therefrom the proper entries in his warehouse record of the goods delivered. The receipt will be in the following form, viz:

———, ——— —, 186–.

I hereby certify that I have this day received from the storekeeper named in the above order the merchandise therein described.

(Signed) ——— ———,
Inspector of Tobacco.

Before the goods are permitted to leave the warehouse the following words must be marked or branded upon each package, under the supervision of the storekeeper, at the expense of the owner, viz: "U.
136 S. bonded warehouse, ——— district of ———, for transportation to ——— district of ———," inserting in the proper place the number of the district and name of the State.

It will be the duty of the inspector to accompany the packages to the place of shipment, deliver them to the transportation company or their agent, obtain three bills of lading, filled up and signed as directed,

and return them to the collector, together with his certificate appended to the duplicate, Form G, as follows, viz:

———, ———, 186–.

I hereby certify that I have this day complied with the foregoing order in every particular, and I herewith deliver three bills of lading for the merchandise, as required.

(Signed) ——— ———,
Inspector of Tobacco.

The bill of lading will be in the form heretofore required, and the instructions heretofore given in reference to the disposition of bills of lading will apply here. An extra copy may be obtained for the shipper, if desired.

RECEIVING AND STORING GOODS CONSIGNED TO THE COLLECTOR.

It will be the duty of the owner of the goods or his agent, after giving notice of his ownership or agency, and his address, to the collector to whom they are consigned, to pay the freight and charges upon the merchandise immediately upon its arrival at the place of destination. He will also, before its arrival, file with said collector an entry of the merchandise, in duplicate, in the following form, viz:

FORM I.

Entry of merchandise to be stored in the export bonded warehouse for the storage of manufactured tobacco and snuff at ———, owned by ——— ———, in the —— district of the State of ———.

Marks and numbers.	No. of packages, and contents.	No. of pounds.	Rate of tax.	Amount of tax.

The said merchandise having been removed from the export bonded warehouse owned by ——— ———, situated in ———, county of ———, and State of ———, being the ——— collection dis-
137 trict in said State, under bond given by ——— ———, and dated the —— day of ———, A. D. 186–, and bill of lading issued by ——— Company, dated the —— day of ———, 186–.

(Signed) ——— ———.
Dated at ———, ——— —, 186–.

The merchandise must be described in the foregoing form precisely as described in the bond, Form H.

The collector of internal revenue, to whom the goods are consigned, upon receiving notice of their arrival, will immediately detail an inspector of tobacco to superintend their removal to the export bonded warehouse, which shall be designated by the collector, and will also deliver to said officer both copies of the entry, Form I, with an order thereto appended, to proceed as directed to the place where the goods may be,

take charge of them, transfer and deliver them to the proper storekeeper at the designated bonded warehouse. It will be the duty of the inspector to inspect the goods, weighing and marking, when necessary, according to the instructions heretofore given on page 17.

The collector's order will be in the following form, viz:

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
—— *District of the State of* ———, ——, 186–.

SIR: You will proceed to [here name the place, pier, or depot,] and there take charge of the above-described goods, superintend the transfer of, and safely deliver the same to the storekeeper of the above-named export bonded warehouse, taking his receipt for the same hereon, which you will return to me with this order as soon as the transfer and delivery is completed, and you will inspect the goods according to regulation, and report your inspections in detail on the back hereof, noting changes in weights, if any.

(Signed) ——— ———,
Collector.

To ——— ———,
Inspector of Tobacco.

The inspector, having complied with these instructions, will indorse upon Form I his certificate as follows, viz:

—— DISTRICT OF THE STATE OF ———,
———, ——— —, 186–.

I hereby certify that I have inspected, [weighed, and marked,]* according to regulation, the merchandise described in the within
138 entry, now deposited in the export bonded warehouse therein named; that I found the same to be as follows, viz:

Marks and numbers.	No. of packages, and contents.	No. of pounds.	Rate of tax.	Amount of tax.	

and that the foregoing entries are true, correct, and complete.

(Signed) ——— ———,
Inspector of Tobacco.

The storekeeper will then append to the foregoing certificate, on the duplicate form, his certificate as follows, viz:

——— ———, 186–.

I hereby certify that I have received the merchandise described in the foregoing certificate of the inspector; that the same has been duly inspected, and is now safely stored in the export bonded warehouse, of which ——— ——— is proprietor, at ———, under my charge.

(Signed) ——— ———,
Storekeeper.

* The words in brackets to be erased if the original weights are correct.

The inspector, leaving the original with the storekeeper, will immediately deliver the duplicate to the collector; and the storekeeper, retaining the original, will make therefrom the proper entries on his warehouse record on the day of the receipt and inspection of the goods.

On the receipt of the duplicate, Form I, with the certificates thereon of the inspector and storekeeper, the collector will take from the owner or consignee of the merchandise a warehousing bond (Form E) for the same; and thereafter the proceedings will be precisely in accordance with the instructions heretofore given, following Form E on page 19.

FEES FOR TRANSFER OF GOODS.

The inspector who superintends the transfer of goods under these instructions will be entitled to receive from the owner of the goods a fee of ten cents per package, provided that if the number of packages is less than ten the inspector's fee shall not be less than one dollar; and if the number exceeds fifty, the fee shall not exceed five dollars.

III. WITHDRAWAL FOR EXPORTATION.

Any person desiring to withdraw manufactured tobacco or snuff from an export bonded warehouse for immediate exportation will
139 file with the collector of internal revenue having charge of exports an entry in duplicate in the following form, viz:

ENTRY OF WITHDRAWAL FOR EXPORTATION.

FORM K.

Entry of merchandise intended to be withdrawn by ——— ———, from the export bonded warehouse of ———, in the ——— district of the State of ———, for immediate exportation to ———, on board the ———, whereof ——— ——— is master, which was placed in said export warehouse under warehouse bond No. —, given by ——— ———, and dated the —— day of ———, 186–, and which is described as follows:

Marks and numbers.	No. of packages, and contents.	No. of pounds.	Rate of tax.	Amount of tax.	

[50-cent stamp.]

(Signed) ——— ———.

Dated at ———, —— —, 186–.

This entry must be made and signed by the real owner or his agent, duly authorized by power of attorney properly acknowledged and filed with the collector in charge of exports, who must make the following oath or affirmation before the said collector, and append the same to Form K, viz:

I, ——— ———, do solemnly swear (or affirm) that the merchandise

described in the within entry is truly intended to be immediately exported from the port of ——— to the port of ———, without the limits of the United States, and is not intended to be relanded within the limits of the United States. I further swear (or affirm) that, to the best of my knowledge and belief, said merchandise is the same in quality, quantity, and value, wastage and damage excepted, as at the time of storage, and that the description and value, as stated in said entry, are correct: So help me God.

(Signed) ——— ———.

Sworn (or affirmed) and subscribed this —— day of ———, 186–, before me.

(Signed) ——— ———,
Collector.

140 On receiving this entry, in duplicate, the collector will require the exporter to execute and deliver to him a bond, with at least two good and sufficient sureties, in a penal sum equal to double the amount of the tax on the merchandise named in the entry, Form K, in the following form, viz:

FORM L.

Know all men by these presents that we, ——— ———, ——— ———, as principals, and ——— ——— and ——— ———, as sureties, are held and firmly bound unto the United States of America, in the sum of ——— dollars; for the payment whereof to the United States we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents, as witness our hands and seals, at ———, this —— day of ———, eighteen hundred and sixty ——.

The condition of this obligation is such, that if the following-described merchandise, viz: [Here insert description contained in Form K.]

Marks.	Numbers.	Description of goods.	Weight.	Amount of tax.

entered by ——— ———, to be exported in the ship ———, whereof ——— ——— is master, to the port of ———, be landed at said port, and be not relanded at any port or place within the limits of the United States; and if the said obligors, by themselves or their legal representatives, shall produce to the collector in charge of exports for the port of ——— for the time being, within ——— from the date hereof, a landing certificate, as required by the regulations of the Commissioner of Internal Revenue, embracing the declaration of the consignee of the exporter at the port without the jurisdiction of the United States at which said merchandise may be landed, together with the certificate of the chief revenue officer or collector of such port that said merchandise has been landed and duly entered at the custom-house at such port, and that the duties imposed thereon by the laws of the country in which the port is situated have been paid, or secured to be paid, and the certificate of the consul or agent of the United States residing at such port that the statements set forth in said declaration of the consignee are, in his opinion, true and deserving of full faith and credit,

and that the signature of said chief revenue officer to his said certificate is genuine, then this obligation to be void; otherwise to remain in full force and effect.

And the obligors, for themselves, their heirs, executors, administrators, and assigns, do further covenant and agree with the United States, in case said evidence is not produced, or in case said merchandise, or any part thereof, is relanded in the United States by them, or either of them, or by their procurement or connivance, well and truly to pay, or cause to be paid, to the collector aforesaid, the amount of tax on said merchandise of which no evidence is produced of having been exported, in pursuance of this bond, or which shall be relanded in the United States contrary to law.

141

_____ _____. [SEAL.]
_____ _____. [SEAL.]
_____ _____. [SEAL.]

Sealed and delivered in the presence of—

_____ _____.
_____ _____.

[25-cent stamp.]

TIME ALLOWED FOR PRESENTING PROOF.

The time named in the bond for the production of the landing certificate must not exceed sixty days if the exportation is to the Dominion of Canada, to any other of the British North American Provinces, or to any of the West India Islands, or to the Gulf, Atlantic, and frontier ports in Mexico, or to Atlantic ports in Central America, and to Atlantic ports north of the equator in South America; if to any place other than those above mentioned, not beyond the Cape of Good Hope, the time must not exceed nine months; and if beyond the Cape of Good Hope, it must not exceed eighteen months. It will be the duty of the collector to take particular care to ascertain the time ordinarily required for exportation to and return from any of the places to which exports may be made, fix the time that may be actually required, not exceeding the limits above prescribed, and fill the bond accordingly. If in any case circumstances beyond the control of the exporter, or his agents, should render a longer time than that fixed in the bond necessary, an extension may be obtained by a presentation of the facts through the collector to the Commissioner of Internal Revenue.

SUFFICIENCY OF BONDSMEN.

If the ample sufficiency of both principal and sureties is not personally known to the collector, he will require the parties to present a sworn statement of the amount and kinds of their personal property, and a schedule of their real estate, or so much thereof as will be ample for security, in the manner prescribed in Form 33.

TRANSFER OF GOODS TO VESSEL.

The bond, Form L, having been duly executed and delivered to the collector, he will select a proper inspector of tobacco, whose duty it will be to receive the goods from the storekeeper in charge of the warehouse;

to superintend their transfer to the vessel; to obtain the receipt of the master or mate of the vessel for the goods, and to procure a bill of lading for the same, which he will return to the collector. The collector
142 will deliver to such inspector the original and duplicate copies of the entry, Form K, and append to them an order to the storekeeper having charge of the goods, directing him to deliver the same to the inspector. This order will be in the following form, viz:

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
——— *District, State of* ———, ———, 186–.

SIR: You are hereby directed to deliver into the custody of Mr. ——— ——— the above-described merchandise, now stored in the export bonded warehouse of ———, and under your charge at ———, the said goods having been bonded by ——— ——— for immediate exportation, as above described; and the said ——— ———, inspector, who will deliver to you this order, will superintend the removal of said goods to the place designated, and deliver them to the master of said vessel, taking his receipt therefor on the duplicate of this order, and forthwith returning the same to me, with his report, and a bill of lading of said goods duly signed.

(Signed) ——— ———,
Collector.

To Mr. ——— ———,
Storekeeper.

Before the packages are taken away from the export bonded warehouse, the words "For export from U. S. A." must be distinctly marked upon each package, at the expense of the exporter or owner, and under the supervision of the storekeeper.

The inspector, on receiving the goods from the storekeeper, will append or indorse his receipt for the same upon one copy of Form K, and deliver it to the storekeeper, who will retain it as his voucher, making therefrom the proper entries in his warehouse record. The receipt will be in the following form, viz:

——— ———, 186–.

I hereby certify that I have this day received from the storekeeper named in the above order the merchandise therein described.

(Signed) ——— ———,
Inspector of Tobacco.

The inspector, having received the goods, will superintend their immediate transfer to the vessel named in Form K, and will deliver them to the master or mate of said vessel, taking his receipt therefor on the duplicate Form K, which will be in the following form, viz:

PORT OF ———, ———, 186–.

I have received the goods described in the within entry, and have caused them to be laden on board the ———, whereof I am [master or mate, as the case may be,] for exportation to the port of ———.

(Signed) ——— ———,
Master or Mate.

The inspector will at the same time procure from the master or mate a bill of lading of the goods, duly signed, which he will return,
143 with the duplicate Form K, to the collector as soon as the transfer is completed.

PROOF REQUIRED FOR THE DISCHARGE OF EXPORT BONDS.

For the discharge of export bonds, or bonds not to reland within the United States, the exporter must produce and deliver to the proper collector of internal revenue, within the time limited in each bond, a landing certificate embracing evidence of the following description, viz:

1. The declaration of the consignee of the exporter at the foreign port, describing the articles exported, and declaring that the same have been received by him from on board the vessel, specifying the name and nation of the vessel from which they were so received, together with the date of landing and other particulars as given in the form of declaration hereinafter prescribed.

2. The certificate of the chief revenue officer or collector of the foreign port, (appended to the foregoing,) under the hand and seal of that officer, certifying that the merchandise described has been landed, duly entered at the custom-house at said port, and that the duties imposed thereon by the laws of the country in which the port is situated have been fully paid, or secured to be paid.

3. The certificate of the consul or agent of the United States residing at such port, certifying to the truth of the statements set forth in the certificate of the consignee, and also that the person signing the foregoing certificate is the chief revenue officer of the port, and that his signature is genuine.

The landing certificate will be in the following form, viz:

FORM M.

Landing certificate.

PORT OF ———, ———, 186–.

I, ——— ———, of ———, do hereby declare that the goods or merchandise hereinafter described have been landed at this port, between the —— and —— days of ———, from on board the ———, of ———, whereof ——— ——— is at present master, viz:

Marks and numbers.	Description of goods.	Pounds.	Rate of tax.	Am't of tax.

Which, according to the bills of lading for the same, was shipped on board the ———, at the port of ———, in the United States
144 of America, on or about the —— day of ———, 186–, and consigned to ——— by ——— ———, of ——— aforesaid.

Given under my hand at ———, this —— day of ———, 186–.

(Signed) ——— ———.

PORT OF ———, ———, 186–.

I, ——— ———, do hereby certify that the goods, wares, and merchandise described in the foregoing declaration, imported into this [country or province] from ———, were landed at this port, and duly entered at the custom-house here, on the —— day of ———, 186–, and that the duties imposed by the laws in force in this [country or province] upon said goods have been paid, or secured to be paid.

In witness whereof I have hereunto set my hand and seal of office this —— day of ——, 186–.

(Signed) ——— ———, [SEAL.]
Collector or Chief Revenue Officer.

OFFICE OF ——— ———,
Port of ———, ———, 186–.

I, ——— ———, [consul or agent] of the United States of America at the port of ———, do declare that the facts set forth in the foregoing declaration subscribed by ——— ———, of said port, and dated the —— day of ———, are, in my opinion, true and correct, and deserving of full faith and credit; and I further certify that ——— ———, whose signature is appended to the preceding certificate of the entry of the above-described merchandise at the custom-house as [collector or chief revenue officer] of this port, was, to my knowledge, the [collector or chief revenue officer] at this port at the date of signing said certificate, and that the signature thereto is in the handwriting of said ——— ———.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office, at ———, this —— day of ———, 186–.

(Signed) ——— ———, [SEAL.]
Consul.

IV. WITHDRAWAL AFTER PAYMENT OF TAX.

The party desiring to withdraw manufactured tobacco or snuff from an export bonded warehouse after the tax has been paid thereon will file with the collector an entry for withdrawal in the following form, describing the goods as they were entered for warehousing, viz:

ENTRY FOR WITHDRAWAL.

FORM N.

Entry of merchandise intended to be withdrawn from the export bonded warehouse of ——— ———, at ———, in the ——— district of the State of ———, by ——— ———, for consumption, on payment of the taxes, the same having been stored in said warehouse by ——— ———, on the —— day of ———, 186–, and which were described as follows, viz:

Marks and numbers.	No. of packages, and contents.	No. of pounds.	Rate of tax.	Amount of tax.	

Dated at ———, ———, 186–.

(Signed) ——— ———.

[50-cent stamp.]

At the time this entry is filed, the collector will require the applicant to pay the amount of the tax in money for the required stamps, and will at the same time direct the proper inspector of tobacco to proceed to the export bonded warehouse and affix the stamps to each package. The collector will deliver to the inspector the entry, Form N, with his order appended thereto, in the following form, viz:

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
——— *District of* ——— ———, 186–.

SIR: You will inspect the above-described merchandise and affix the proper stamp to each package containing the same, and make report thereof hereon.

(Signed) ———— ————,
Collector.

To ———— ————,
Inspector of Tobacco.

The inspector, having performed the work, will indorse or append his report to the above order as follows, viz:

——— DISTRICT OF THE STATE OF ———,
————, ————, 186–.

SIR: I have complied with the above order in every particular.

(Signed) ———— ————,
Inspector of Tobacco.

To ———— ————, Esq.,
Collector.

146 The taxes having been fully paid and the stamps affixed, the collector will issue a permit for the delivery of the goods, which permit must be presented to the assessor of the district for his certificate that the same has been presented to him, and that the amount of taxes paid thereon has been entered in his bonded account of the district; and no storekeeper will deliver any such merchandise from the bonded warehouse wherein it is stored except upon presentation of a permit in the following form, signed by both the collector and assessor:

FORM O.

OFFICE OF COLLECTOR OF INTERNAL REVENUE,
——— *District, State of* ———, ———, 186–.

Permission is hereby given to ———— ———— to remove from the export bonded warehouse —, of ———— ————, situated in ———, the following described merchandise:

Marks and numbers.	No. of packages, and contents.	No. of pounds.	Rate of tax.	Amount of tax.

the full amount of taxes due and owing thereon having been paid to me for the requisite stamps affixed to the packages.

———— ————,
Collector.

To ———— ————,
Storekeeper.

I hereby certify that the foregoing permit has been presented to me, and that the amount of taxes certified therein to have been received

has been entered in the bonded account of this district, kept in my office.

——— ———,
Assessor.

This permit, signed by the collector and assessor, as above directed, will be retained by the storekeeper as his voucher, and from it he will make the proper entries on his warehouse record.

MODE OF ESTABLISHING EXPORT BONDED WAREHOUSES.

Section 73 provides, "That the Commissioner of Internal Revenue, upon the execution of such bonds as he may prescribe, may designate and establish, at any port of entry in the United States, bonded
147 warehouses for the storage of manufactured tobacco and snuff, in bond, intended for exportation, selecting suitable buildings for such purpose, to be recommended by the collector in charge of exports at such port, to be known as export bonded warehouses, and used exclusively for the storage of manufactured tobacco and snuff in bond. Every such warehouse shall be under the control of the collector of internal revenue in charge of exports at the port where such warehouse is located, and shall be in charge of an internal-revenue storekeeper assigned thereto by the Commissioner of Internal Revenue."

A warehouse of this class must be an entire building, and be a first-class warehouse, according to the classification of fire insurance companies of the city or place, or of the board of fire underwriters, where such exist; and, when adjoining other buildings, it must be separated therefrom by a brick or stone wall, in which no door or other opening can be permitted. No goods whatever can be stored in the bonded premises except bonded tobacco and snuff.

No greater number of export warehouses will be established in any port of entry than are necessary to accommodate the business, nor can any manufacturer of tobacco or snuff be interested in such warehouses as owner or proprietor.

The party desiring to establish such a warehouse will make application to the collector in charge of exports at the port of entry, describing the premises, the location, and capacity of the same, accompanying the application with a sketch or diagram, showing the relative position of the warehouse and surrounding buildings.

The application, to entitle it to consideration, must be accompanied by a certificate, properly stamped, signed by the officers of two or more insurance companies, that the premises offered are suitable, and may be insured at the usual rates for like property.

The collector will thereupon, by himself or deputy, examine and inspect the premises; and if, in his opinion, the location, construction, dimensions, and the means provided for securing custody of the merchandise which may be stored in the same are satisfactory, he will require the owner or applicant to give the proper bond. The form of the bond will be as follows, viz:

FORM P.

Know all men by these presents that we, ——— ——— and ——— ———, as principals, and ——— ——— and ——— ———, as sureties, are held and firmly bound unto the United States of America in the sum of ——— dollars; for the payment of which, well and truly to be

made to the United States, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, as witness our hands and seals, at ———, this ——— day of ———, eighteen hundred and sixty——.

The condition of this obligation is such, that if the above-bounden principals, or either of them, or either of their heirs, executors, administrators, or assigns, shall comply in all respects with the provisions
148 and requirements of the internal-revenue laws, and the regulations of the Commissioner of Internal Revenue, made in pursuance thereof, and exonerate and hold the United States and its officers harmless from or on account of any risk, loss, or expense of any kind or description, connected with or arising from the deposit or keeping of any goods, wares, or merchandise that may be deposited in the warehouse herein described, under the provisions of any law now existing or hereafter enacted, and shall not store in the warehouse known as ———, situated in ———, any other goods, wares, or merchandise than those duly bonded for warehousing and designated to be deposited in such warehouse by the internal-revenue laws, and ordered to be deposited therein by the collector in charge, and shall safely keep all goods stored therein, and shall deliver the same to the order of the collector of internal revenue, looking to the owner of said goods for the storage and charges, and shall not remove, or suffer to be removed, from said warehouse, any goods, wares, or merchandise stored therein, without lawful permit, and without the presence of the officer having custody thereof, or, in case of such removal, shall pay to the collector of internal revenue for the district the tax upon the merchandise so removed, then this obligation to be void; otherwise to be and remain in full force and virtue.

——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of—

——— ———.
——— ———.

[25-cent stamp.]

The penal sum in the foregoing bond should in no case be less than ten thousand dollars, and should always be sufficient to cover the tax on the total quantity of merchandise that can be stored in the warehouse at one time.

The bond having been properly executed and delivered to the collector, he will report in writing concerning the application, stating the fact of personal inspection of the premises by himself or deputy, and giving his opinion as to the necessity, capacity, and security of the warehouse.

No application for an export bonded warehouse will be granted unless accompanied by the collector's certificate that the number of warehouses of that class already established in the district is not sufficient, and that the establishment of such additional warehouse is necessary for the storage of bonded tobacco and snuff intended for export. Nor will an application be granted unless the collector certifies that neither one of the applicants for the same is engaged in the manufacture of tobacco or snuff.

The collector must also certify that the building or premises offered are satisfactory in respect to location, construction, dimensions, and

the means provided for securing the safe custody of the merchandise which may be stored therein, and are in every particular in accordance with law and regulations.

149 The collector, having made his report, embracing the proper certificates, as above directed, will mail the same to the Commissioner of Internal Revenue, together with—

1. The application and diagram;
2. The insurance certificates; and
3. A certified copy of the bond, on which the collector will indorse his certificate of the sufficiency of the penalty, and the responsibility of the obligors.

If the application for a warehouse is approved by the Commissioner, due notice will be given to the collector, and he will in no case allow the warehouse to be used as an export bonded warehouse until such notice is received by him, nor until all tax-paid or free goods are removed therefrom.

WAREHOUSES TO BE NUMBERED, ETC.

Export bonded warehouses will be numbered consecutively in each district. A conspicuous sign must be placed over the front entrance of each, or upon the outer wall, so that it can be plainly seen and read from the street, and will be in substance as follows:

INTERNAL REVENUE EXPORT BONDED WAREHOUSE,
——— *District*,
No. —.
———, *Proprietor*.

These blanks must be properly filled, so as to show the number of the district, the number, and the name of the proprietor.

Neglect to furnish and keep this sign in proper place will be cause for the discontinuance of the warehouse.

Assessors and collectors will designate each warehouse by its number on the warehouse record.

WAREHOUSE HOURS OF BUSINESS.

Storekeepers are required to personally superintend the opening and closing of the doors and windows of the warehouse under their charge, and, unless by express permission of the Commissioner, to be in constant attendance at the warehouse from 7 o'clock a. m. to sunset, from April 1 to October 1, and for the residue of the year from 8 a. m. to sunset, except at the time necessary for dinner, not over one hour at noon, when the warehouse must be closed and locked.

SUITABLE OFFICES TO BE PROVIDED.

An office for the accommodation of the owner or occupant may be allowed in export warehouses, but such office must be separated by a permanent partition from the rest of the store, so that the owner shall have no access to the goods, except in the presence of the storekeeper, who, in such case, must be allowed such use of the office as may be necessary in the performance of his official duties.

150 WHAT SAMPLES ALLOWED.

All merchandise in an export bonded warehouse may be examined during the business hours of the warehouse by the owner or consignee, or by an agent, upon the written order of the owner or consignee, who will be at liberty to take samples of the goods in quanties not to exceed one-half pound from any one lot warehoused by the same entry, while stored under that entry.

No samples can be taken, nor any goods be exhibited or examined, except under the immediate supervision of the storekeeper, and such officer must make a memorandum in the warehouse record of the date and description of such sampling, opposite the entry of the lot thus sampled.

DISCONTINUANCE OF EXPORT BONDED WAREHOUSES.

Export warehouses will be subject to such further rules as may be deemed necessary, from time to time, for the safe-keeping of the goods and protection of the revenue, and may be discontinued as bonded warehouses by the Commissioner of Internal Revenue when, in his opinion, the public interests may require. In case of such discontinuance, if there should be any goods in store which it would be necessary to remove to another bonded warehouse, the expense of removal must be paid by the owner of the discontinued warehouse.

Should the owner or occupant of any building designated as an export bonded warehouse fail or refuse to comply with any law regulating the storage or merchandise, or any rules or regulations issued by the Commissioner of Internal Revenue, or by the collector, for the safety of the goods stored, the collector will refuse permission to deposit goods in such store, and report the facts at once to the Commissioner of Internal Revenue for his action.

The proprietors or occupants of export warehouses, on ten days' notice from the collector, may be required to renew their bonds; and if they fail so to do, no more goods will be sent to such warehouses, and those within the same will be withdrawn at their expense.

The owner or occupant of any export warehouse will have the right to relinquish the business at any time, with the approval of the collector of the district, and on notice to the owners of the merchandise deposited therein, and paying the expense of its removal to another export warehouse.

Collectors will report the date and reasons for the discontinuance of such warehouse to the Commissioner of Internal Revenue as soon as such discontinuance takes place. But the bonds are not to be cancelled or delivered up to the bondsmen, but are to be retained and filed by the collector in his office. Collectors may, however, when the facts justify, give a certificate that the warehouse has been discontinued and surrendered to the owner, and that, so far as known to the collector, the conditions of the bond have been filled.

LABOR ON GOODS AND RATES OF STORAGE.

All labor on the goods deposited in these stores must be performed by the owner or proprietor of the warehouse, under the supervision of the officer in charge of the same, and at the expense of said owner
151 or proprietor. All arrangements in regard to the rates of storage and the price of labor on goods deposited in export warehouses

must be made between the depositor and the owner or occupant of the store, and all amounts due for storage and labor must be collected by the latter, the collector of internal revenue looking only to the custody of the merchandise for the security of the revenue.

JOINT CUSTODY OF WAREHOUSES.

Export warehouses must be under the joint custody of the owner or proprietor and the storekeeper appointed for the purpose, and must be under internal-revenue locks prescribed by the Commissioner of Internal Revenue, in addition to the locks of the owners, which latter must not open with the same key as the former.

COLLECTOR MAY ORDER ADDITIONAL FASTENINGS.

After stores or premises have been approved and placed under internal-revenue locks, the collector will retain the right of ordering additional fastnings, to be provided by and at the expense of the owners or occupants having charge of the premises.

DUTIES OF STOREKEEPERS.

It is the duty of the storekeeper always to keep in his own possession the keys of the Government locks in use on the warehouse under his charge, never suffering them to go out of his custody, except to the collector, or to his successor in office, upon the order of the collector. Nor must he allow any goods to be received or delivered, except in his presence, nor must he be absent from the warehouse while it is unlocked. He should also be always present when goods are inspected, and see that none are unlawfully abstracted or taken away. The owner or proprietor of the warehouse will in no case be allowed to have access to it, except in presence of the storekeeper or collector having charge thereof, and the storekeeper will promptly inform the collector of any infraction of the warehouse rules and regulations by the owner or proprietor, any inspector, or other person.

Any storekeeper who is absent from the warehouse under his charge while it is unlocked will be discharged.

STOREKEEPER'S RECORD OR ACCOUNT AND RETURNS.

The storekeeper, or officer in charge of each warehouse, will keep a correct account of all goods received into his store and delivered therefrom, specifying in detail the date of receipt; original and warehouse marks and number; number and description of packages and contents; from what place received, and, when upon special order of the collector, the date thereof; also date of receipt of permit for delivery; date of delivery; to whom delivered, and for what purpose, as specified in the permit or order for delivery; and will enter in the warehouse-book such
further particulars as may be prescribed or found necessary for
152 the identification of the packages, to insure the correct delivery
thereof. The book for this purpose must be furnished by the owner of the warehouse.

Daily returns must be furnished to the collector in charge of the warehouse of all goods received therein and delivered therefrom, as per Forms R and S.

FORM R.

Storekeeper's return of goods received at export bonded warehouse No. ——, in —— collection district, State of ————, on the —— day of ———, 186–.

Marks and numbers.	Numbers and description of packages, and contents.	By whom deposited.	Whence received and upon what order.	Remarks.

(Signed) ———— ————,
Storekeeper.

FORM S.

Storekeeper's return of goods delivered from the export bonded warehouse No. ——, in —— collection district, State of ———, on the —— day of ———, 186–.

Marks and numbers.	Number and description of packages, and contents.	When rec'd in store, and where from.	Date of indorsement of permit at collector's office.	By whom deposited.	To whom delivered.	Remarks.

(Signed) ———— ————,
Storekeeper.

These returns must be full, explicit, and correct in all details.

No goods are to be delivered from the warehouse by the storekeeper except upon the proper order or permit of the collector of the district.

153 II. CIGARS.

SPECIAL TAX.

Manufacturers of cigars are required to pay a special tax graduated according to the amount of their sales. When the annual sales do not exceed five thousand dollars, the tax is ten dollars, and for each one thousand dollars in excess of five thousand dollars, two dollars additional.

STATEMENT AND BONDS.

Every manufacturer of cigars, before going on with the business, is required to furnish a sworn statement in duplicate, (Form 36,) without previous demand, to the assistant assessor, according to the provisions of section 82. As soon as received, the assessor will transmit one of these statements to the collector, together with a list of the names of

all cigar manufacturers, and the amount of each one's bond as determined by him, in accordance with the provisions of section 82.

No person is allowed to manufacture cigars until such bonds (on Form 74) are filed with the collector, with sureties approved by the assessor. These bonds may be increased from time to time, and additional sureties required at the discretion of the assessor, or under the instructions of the Commissioner of Internal Revenue. Upon the filing of his bond the collector will issue to every cigar manufacturer a certificate (Form 41) setting forth the number of cigar-makers for which the bond has been given, to be posted in a conspicuous place within his manufactory.

RATES OF TAX.

1. On all cigars and cheroots the tax is five dollars per one thousand.
2. On cigarettes, weighing not more than three pounds per one thousand, the tax is one dollar fifty cents per thousand.
3. On cigarettes, weighing more than three pounds per one thousand, the tax is five dollars per thousand.

PACKAGES.

All cigars, from and after the passage of the law, are required (section 85) to be packed in boxes which have never before been used for packing cigars; said boxes are to contain twenty-five, fifty, one hundred, two hundred and fifty, or five hundred cigars each, and no cigars can be sold or offered for sale, or be delivered, or offered for delivery, (except at retail by retail dealers,) without being packed, or packed in any other form than as described above, or in any other than new boxes.

Every cigar manufacturer is required (section 89) to burn into each box, with a branding iron, the number of cigars contained therein, and the name of the manufacturer, and the number of the district, and the State; and also (section 88) to affix securely by pasting on each box containing cigars manufactured by or for him a label, on which must be printed, together with the manufacturer's name, the number
154 of his manufactory, and the district and State in which it is situated, these words: "NOTICE.—The manufacturer of the cigars herein contained has complied with all the requirements of the law. Every person is cautioned, under the penalties of law, not to use this box for cigars again."

CIGAR-MAKERS TO BE REGISTERED.

The law requires that every cigar-maker shall cause his name and residence to be registered with the assistant assessor of the division in which he shall be employed, and imposes upon the manufacturer of cigars a fine of $5 for each day he employs any cigar-maker who has neglected or refused to make such registry. (See section 59.) The attention of all cigar manufacturers should be called to this provision of law, and assistant assessors will see that all cigar-makers are registered.

RECORD BOOK.

Section 84 makes it the duty of every assistant assessor to keep in a book a record of the name and residence of every person engaged in the

manufacture of cigars in his division; the number of the manufactory, and the name and residence of every cigar-maker employed; and to enter in said book, under each manufacturer's name, an abstract of his inventories and monthly returns.

Every assessor is to keep a similar record, and to number the manufactories of cigars in his district, commencing with number one, and thenceforward consecutively, and these numbers are not to be thereafter changed.

The numbering of cigar manufactories must not be confounded with the similar requirements in the case of tobacco and snuff manufactories, but a separate numbering of each is required to be made.

INVENTORIES.

Assistant assessors will take special pains to see that all cigar manufacturers comply with the provisions of the .86th section in relation to inventories, (Form 78,) as in the case of tobacco manufacturers, and make a personal examination of their stock as therein required, and verify the fact of such examination.

The Commissioner of Internal Revenue has prescribed blank No. 73 as the form of book to be kept by cigar manufacturers. And their abstracts or monthly returns are to be made on Form No. 72. These returns are required to be made on or before the 10th day of each and every month, verified by oath or affirmation. (See section 66.)

STAMPS.

The tax on all cigars is to be paid by stamps, as in the case of tobacco, on and after a day hereafter to be determined by the Secretary of the Treasury, not later than the first day of December next. These stamps will be furnished to collectors to be sold only to cigar manufacturers who have given bonds and paid special tax in their districts respectively, and to such other persons as are named in section 87.

Prior to the time when stamps shall have been furnished to col-
155 lectors, cigars, before removal for consumption or sale, must be inspected and stamped, and a return made and tax paid as directed in the case of tobacco and snuff.

REMOVAL OF CIGARS.

The law makes no provision for the removal of cigars in bond or to a bonded warehouse, either for export or consumption. Therefore, at present, all cigars removed from the place of manufacture must be returned for taxation, and, after stamps are furnished, all cigars before removal must be stamped as provided by law.

IMPORTED CIGARS.

All cigars imported from foreign countries are required to be put up in boxes, as prescribed in the act for domestic cigars, and the same kind of stamps are to be affixed. The owner or importer is required to affix the stamps, and it is made the duty of the custom-house officers in whose custody such cigars are held to see that these stamps are in all cases affixed.

Any person wishing to withdraw imported cigars from any bonded warehouse prior to the time when stamps shall have been furnished to

collectors will obtain a certificate from the collector of customs or officer having custody of the same, showing that the number of boxes and the quantity of cigars to be withdrawn are in his custody.

This certificate will be presented to the assessor of the district where the cigars are stored, who will immediately assess the tax thereon and return the same on a special list to his collector.

The collector, upon the payment of the tax, will give his receipt, showing that the tax on the lot of cigars described in the certificate of the custom-house officer has been paid.

The withdrawal of the cigars may then be made upon presentation of such receipt at the custom-house under the regulations of the Secretary of the Treasury.

DEALERS IN CIGARS.

Every dealer in cigars, either of foreign or domestic manufacture, having on hand more than five thousand at the time of the passage of the law, is required (section 94) to make and deposit with the assistant assessor a true and correct inventory (Form 75) of the quantity of such cigars in his possession, and also to make a like inventory on the first day of every month, while he has any such cigars on hand, until April 1st, 1869. These inventories are all to be returned to the assessor, who is required to send abstracts of them to the Commissioner of Internal Revenue.

After the first day of April, 1869, all cigars in the hands of dealers are to be taken as having been either manufactured or imported after the passage of the law, and must be stamped accordingly.

E. A. ROLLINS,
Commissioner.

156 *Instructions to suppress the unauthorized production of alcoholic spirits and vapors.*

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, July 25, 1868.

The provisions of section four of the act of July 20, 1868, are as follows:

"SEC. 4. *And be it further enacted*, That distilled spirits, spirits, alcohol, and alcoholic spirits, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirits, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process; and no mash, wort, or wash fit for distillation, or the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no such mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person other than an authorized distiller shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol, or any vapor of alcoholic spirits, in manufacturing vinegar or any

other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid. Any person who shall violate any of the provisions of this section shall be fined for every offence not less than five hundred dollars nor more than five thousand dollars, and imprisoned for not less than six months nor more than two years: *Provided*, That nothing in this section shall be construed to apply to fermented liquors."

The object of this section was evidently to enable the Internal Revenue Office to suppress all manner of distillation of spirits not expressly authorized by law, and to collect the tax on all alcoholic spirits manufactured. The laws existing prior to this act were found to be inefficient, and all efforts to secure a uniform enforcement of them were frustrated by a disagreement among the courts in different sections of the country as to the proper construction of such laws. The meaning of this section, however, cannot be a matter of doubt. Under it no article into which alcoholic spirits or alcoholic vapors enter as an ingredient can be lawfully manufactured except such spirits or alcohol have been produced in an authorized distillery and have paid the tax.

The largest class of cases affected by this section is that of the manufacturers of vinegar by various processes of distillation. Many of these manufacturers have been honestly engaged in the business of making vinegar with no intention to defraud the revenue; while many others, under the pretence of making vinegar alone, have been committing flagrant and intentional frauds. Between these two classes Congress has made no discrimination, and the provisions of this section were intended to close all such manufactories.

In order that equal and uniform justice may be done to all persons engaged in this business, assessors and collectors will at once take steps to advise those in their respective districts of the terms of the law, and the purpose of the Department to require full compliance with its provisions; and if any one carries on, or attempts to carry on, the business prohibited by this section, after being so advised, they will institute proceedings under its penal provisions.

E. A. ROLLINS,
Commissioner.

20, 1868, *the assessor should require, before approval, that the sureties shall be shown conclusively to be persons possessed of unincumbered real estate in the county in which the distillery is situated, or in an adjoining county in the same State, at least equal in value to the amount of the penal sum of the bond. Respectfully,*

E. A. ROLLINS,
Commissioner.

157 *Schedule of duties under this statute.*

Distilled spirits, every proof-gallon	50 cents.
On wine-gallon, if below proof	50 cents.
Brandy, made from grapes, per gallon	50 cents.
Distillery, having aggregate capacity for mashing, &c., 20 bushels of grain per day, or less	$2 00 per day.
Capacity, in excess of 20 bushels of grain per day, for every 20 bushels	2 00 per day.
Stamps, other than tax-paid stamps charged to collector, each	25 cents.

Imitation wines and champagne, not made from grapes, currants, rhubarb, or berries grown in United States, rectified or mixed, to be sold as wine or any other name, per dozen bottles of more than a pint, and not more than a quart	$6 00
Containing not more than one pint, per dozen bottles	3 00

SPECIAL TAXES.

Distillers, producing 100 barrels or less, (40 gallons of proof-spirit to barrel)	400 per year.
And for each barrel in excess of 100 barrels	4 00
On each barrel of 40 gallons in warehouse when act takes effect, and when withdrawn, (under section 62)	4 00
Rectifiers, rectifying 200 barrels, or less, of 40 gallons to barrel, per year	200
For each barrel in excess	50 cents.
Compounder of liquors	$25 00
Retail dealers in liquors	25 00
Wholesale liquor-dealers, whose annual sales do not exceed $25,000	100 00
And for every $1,000 of sales in excess	10 00
Manufacturers of stills	50 00
For each still or worm made	20 00

TOBACCO, SNUFF, AND CIGARS.

Dealers in leaf tobacco, whose annual sales do not exceed $10,000	25 00
On every $1,000 in excess	2 00
Dealers in tobacco, whose annual sales exceed $100, and do not exceed $1,000	5 00
When exceeding $1,000, for each $1,000 in addition	2 00
Manufacturers of tobacco	10 00
When bond exceeds $5,000, for each $1,000 in excess of $5,000	2 00

158 To Jesse O. Norton, esq., district attorney for the northern district of Illinois:

You will please to take notice that on Monday, the 9th day of November, instant, I shall file the foregoing bill of complaint in the circuit court for the northern district of Illinois, on the chancery side thereof, and shall then and there, or as soon thereafter as counsel can be heard, apply to said court for an injunction, and an order that you appear and answer, &c., according to the prayer of said bill.

Dated at Chicago this 6th day of November, A. D. 1868.

EDWARD ROBY,
Complainant's Solicitor.

I have this day been attended with, and received from the hand of Edward Roby a copy of the foregoing bill of complaint, and a notice, of which the foregoing is a copy.

Dated at Chicago this 7th day of November, A. D. 1868.

JESSE O. NORTON,
U. S. Att'y.

(Endorsed:) Filed Nov. 9th, 1868. W'm H. Bradley, cl'k.

159 On the same day, to wit, the 9th day of Novem. a writ of subpœna issued out of said clerk's offi defendants in said entitled cause; which said writ, tog memorandum thereto, and the return of the marshal thei words and figures following, to wit:

126

Subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Edward A. Rollins, Commissioner of the Internal Revenue, W. B. Allen, collector, and Duncan Ferguson, assessor, greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of December next, to answer the bill of complaint of Lemuel W. Mason, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

160 To the marshal of the northern district of Illinois, to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this ninth day *day* of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-third.

[SEAL.] W'M H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they, and each of them, shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and decree entered accordingly.

W'M H. BRADLEY, *Clerk.*

Executed the within writ by delivering a true copy of this writ to the within-named W. B. Allen and Duncan Ferguson this 1st day of Dec., A. D. 1868.

J. R. JONES, *U. S. Marshal,*
By P. MUNSON, *Deputy.*

161 (Endorsed:) Filed Jan'y 4th, A. D. 1869. W'm H. Bradley, clerk.

On this day, to wit, the 16th day of December, A. D. 1868, came said defendants by Jesse O. Norton, esq., district attorney, and filed in said clerk's office their demurrer in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

In the U. S. circuit court, northern district of Illinois, in chancery.

LEMUEL W. MASON, COMPL'T,
vs.
EDWARD A. ROLLINS ET AL., DEFENDANTS.

These defendants by protestation, not confessing all or any of the

Imitation wines and champagne, not made from grapes, currants, rhubarb, or berries grown in United States, rectified or mixed, to be sold as wine or any other name, per dozen bottles of more than a pint, and not more than a quart	$6 00
Containing not more than one pint, per dozen bottles.	3 00

SPECIAL TAXES.

Distillers, producing 100 barrels or less, (40 gallons of proof-spirit to barrel)	400 per year.
And for each barrel in excess of 100 barrels	4 00
On each barrel of 40 gallons in warehouse when act takes effect, and when withdrawn, (under section 62).	4 00
Rectifiers, rectifying 200 barrels, or less, of 40 gallons to barrel, per year	200
For each barrel in excess	50 cents.
Compounder of liquors	$25 00
Retail dealers in liquors	25 00
Wholesale liquor-dealers, whose annual sales do not exceed $25,000	100 00
And for every $1,000 of sales in excess	10 00
Manufacturers of stills	50 00
For each still or worm made	20 00

TOBACCO, SNUFF, AND CIGARS.

Dealers in leaf tobacco, whose annual sales do not exceed $10,000	25 00
On every $1,000 in excess	2 00
Dealers in tobacco, whose annual sales exceed $100, and do not exceed $1,000	5 00
When exceeding $1,000, for each $1,000 in addition	2 00
Manufacturers of tobacco	10 00
When bond exceeds $5,000, for each $1,000 in excess of $5,000	2 00

158 To Jesse O. Norton, esq., district attorney for the northern district of Illinois:

You will please to take notice that on Monday, the 9th day of November, instant, I shall file the foregoing bill of complaint in the circuit court for the northern district of Illinois, on the chancery side thereof, and shall then and there, or as soon thereafter as counsel can be heard, apply to said court for an injunction, and an order that you appear and answer, &c., according to the prayer of said bill.

Dated at Chicago this 6th day of November, A. D. 1868.

EDWARD ROBY,
Complainant's Solicitor.

I have this day been attended with, and received from the hand of Edward Roby a copy of the foregoing bill of complaint, and a notice, of which the foregoing is a copy.

Dated at Chicago this 7th day of November, A. D. 1868.

JESSE O. NORTON,
U. S. Att'y.

(Endorsed:) Filed Nov. 9th, 1868. W'm H. Bradley, cl'k.

159 On the same day, to wit, the 9th day of November, A. D. 1868, a writ of subpœna issued out of said clerk's office against said defendants in said entitled cause; which said writ, together with the memorandum thereto, and the return of the marshal thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Edward A. Rollins, Commissioner of the Internal Revenue, W. B. Allen, collector, and Duncan Ferguson, assessor, greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of December next, to answer the bill of complaint of Lemuel W. Mason, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

160 To the marshal of the northern district of Illinois, to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this ninth day *day* of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-third.

[SEAL.] W'M H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they, and each of them, shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and decree entered accordingly.

W'M H. BRADLEY, *Clerk.*

Executed the within writ by delivering a true copy of this writ to the within-named W. B. Allen and Duncan Ferguson this 1st day of Dec., A. D. 1868.

J. R. JONES, *U. S. Marshal,*
By P. MUNSON, *Deputy.*

161 (Endorsed:) Filed Jan'y 4th, A. D. 1869. W'm H. Bradley, clerk.

On this day, to wit, the 16th day of December, A. D. 1868, came said defendants by Jesse O. Norton, esq., district attorney, and filed in said clerk's office their demurrer in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

In the U. S. circuit court, northern district of Illinois, in chancery.

LEMUEL W. MASON, COMPL'T,
vs.
EDWARD A. ROLLINS ET AL., DEFENDANTS.

These defendants by protestation, not confessing all or any of the

matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that the said complainant has not, by his said bill, made such a case as
162 entitles him in a court of equity to any discovery from these defendants respectively, or any of them, or to any relief against them as to the matters contained in the said bill, or any of such matters; and that any discovery that can be made by these defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the said complainant to any relief in this court touching any of the matters therein complained of. Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and they pray the judgment of this honorable court whether they shall be compelled to make any further and other answer to the said bill, and they humbly pray to be dismissed from hence with their reasonable costs in this behalf sustained.

JESSE O. NORTON,
U. S. Att'y, & Solicitor for Def'ts.

(Endorsed:) Filed Dec'b. 16th, 1868. W'm H. Bradley, cl'k.

163 On this day, to wit, the 16th day of December, A. D. 1868, in the record of the proceedings of said court in chancery in said entitled cause is the following entry, to wit:

LEMUEL W. MASON
vs.
EDWARD A. ROLLINS, W. B. ALLEN, AND Duncan Furgason. } Chancery.

Now come the parties by their solicitors, and now comes on to be heard the motion of the complainant for an injunction against the defendants, as prayed for in the bill of complaint herein; and also the demurrer of the defendants to said bill; and, after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

On the next day, to wit, the 17th day of December, A. D. 1868, in the record of the proceedings of said court in chancery in said entitled cause is the following entry, to wit:

164 LEMUEL W. MASON
vs.
EDWARD A. ROLLINS, W. B. ALLEN, AND Duncan Furgason. } Chancery.

Now come again the parties by their solicitors, and now come on further to be heard the motion of the complainant for an injunction against the defendants, and the demurrer of the defendants to the bill of complaint; and, after hearing the arguments of counsel until the hour of adjournment, without concluding the same, the further hearing is postponed until to-morrow morning.

On this day, to wit, the 18th day of December, A. D. 1868, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

LEMUEL E. MASON
vs.
EDWARD A. ROLLINS, W. B. ALLEN, AND Duncan Furgason. } Chancery.

Now come again the parties by their solicitors, and now come
165 on further to be heard the motion of the complainant for an injunction, and the demurrer of the defendant to the bill; and, after hearing additional arguments of counsel, the hour of adjournment having arrived, the further hearing is postponed until a future day.

On this day, to wit, the 21st day of December, A. D. 1868, in the record of the proceedings of said court in said entitled cause is the following entry, to wit:

LEMUEL E. MASON
vs.
EDWARD A. ROLLINS, W. B. ALLEN, AND Duncan Furgason. } Chancery.

Now come again the parties by their solicitors, and, after hearing the concluding arguments of counsel upon the application of the complainant for an injunction against the defendants, and the demurrer of the defendants to the bill of complaint, the court takes the same under advisement.

On this day, to wit, the 4th day of January, A. D. 1869, in the record of the proceedings thereof in said entitled cause is the following
166 entry, to wit:

LEMUEL E. MASON
vs.
EDWARD A. ROLLINS, W. B. ALLEN, AND Duncan Furgason. } Chancery.

The court, having considered and being now fully advised, upon the motion of the complainant for an injunction against the defendants, and the demurrer of the defendants to the bill of complaint herein, overrules said motion for an injunction, and sustains said demurrer; and on motion of the complainant, by his solicitor, leave is given him to amend his bill.

On this day, to wit, the 4th day of January, A. D. 1869, came said complainant by his solicitor, and filed in said clerk's office his motion for leave to amend his bill in said entitled cause; which said motion is in the words and figures following, to wit:

Motion for leave to amend bill.

United States circuit court, northern district of Illinois, in chancery.

167 LEMUEL W. MASON, PLAINTIFF,
and
EDWARD A. ROLLINS, COMMISSIONER OF THE Internal Revenue, and others, defendants. }

To the honorable judges of said court:

The humble petition of the plaintiff showeth that your petitioner

having filed his bill in this court against the above-named defendant and others, and said defendants have appeared thereto, and have not yet answered, and your petitioner is advised to amend his said bill, your petitioner therefore humbly prays that he may be at liberty to amend his said bill as he shall be advised, without costs, amending the defendants' copies.

And your petitioner will ever pray, &c.

LEMUEL W. MASON.

(Endorsed:) Filed Jan'y 4th, 1869. W'm H. Bradley, cl'k.

On this day, to wit, the 31st day of March, A. D. 1869, came said complainant by his solicitor, and filed in said court with the clerk thereof his amendments to his bill of complaint in said entitled cause;
168 which said amendments are as follows, to wit:

Amendments to bill of compl'nt.

United States circuit court, northern district of Illinois, in chancery.

LEMUEL W. MASON, PLAINTIFF,
vs.
EDWARD A. ROLLINS, COMMISSIONER OF THE Internal Revenue; William B. Allen, collector; and Duncan Ferguson, assesssor, defendants. } Amendments to bill of complaint.

And the said plaintiff, Lemuel W. Mason, having been advised to amend his bill of complaint herein in certain matters wherein it was deemed material and necessary, and having duly petitioned to this court for leave to amend his said bill, and due notice of said petition having been given to the defendants herein, and said petition having been duly heard and considered by this honorable court, and the prayer of said petition having been granted by order, duly entered in this cause, now comes the said Mason, and for further complaint, and amendments and additions to his said former bill of complaint, doth respectfully state unto the honorable judges of said court, in chancery sitting, that
169 after the 10th day of September, and before the filing of said bill, the defendants Allen and Ferguson, and divers other persons, under and in pursuance of their directions, have separately and together at divers times entered upon the lands, premises, and alcohol house of this plaintiff, which are particularly described in his said bill, without the authority or consent of this plaintiff, and have trespassed thereon in each and every such entry to the damage and vexation of this plaintiff. And on or about the 30th day of October, A. D. 1868, now last past, the said Allen, collector, and Ferguson, assessor, under color and for the execution of the acts of Congress set forth in said bill in their official capacity, and, as this plaintiff is informed and believes, also under the direction and in pursuance of the regulations and requirements of said Rollins, Commissioner, &c., did, without the consent of this plaintiff, enter upon the premises aforesaid, and into said alcohol house, and did inspect and follow out the several pipes and connections there found, and did compel and require the presence of an artizan or mechanic, with suitable tools, and required and caused the said mechanic to dis-
170 mantle said alcohol still, and disconnect certain of the pipes thereof, and to injure and so derange the same that it, said still,

cannot be used, and did by said trespasses and unlawful acts greatly damage the property of this plaintiff.

And this plaintiff further saith that, on or about the first day of November, A. D. 1868, said Ferguson did, as assessor as aforesaid, say to the lessee and occupant of the distillery mentioned in said bill of complaint, "that the steam-pipe" connecting said alcohol still with the steam-boilers of said distillery, being the pipes appurtenant to the said alcohol still, and through which the steam is to be supplied to said still from the steam-boilers aforesaid, "must be taken out," and did then and there, to wit, before the filing of complainant's said bill, command said lessee of said distillery to remove and take out said pipes altogether, and did say said pipes would have to be taken out, all which requirements and commands of the said Ferguson, as assessor as aforesaid, this plaintiff is informed and believes were given and made as above set forth, and have never been revoked. And this plaintiff believes that said Ferguson did command and require the removal of said pipes as afore-
171 said for the purpose of preventing this plaintiff from having any benefit from the said steam-pipes, and from obtaining and having furnished to him the steam to run his said alcohol house according to the terms of his said lease, and to harrass and vex this plaintiff and destroy his property, and to carry said statutes into effect, and to execute the acts of Congress set forth in his said bill of complaint.

And this plaintiff is further informed and believes that, at the time last aforesaid, said Ferguson, as assessor, did claim the right to remove said pipes, and compel the same to be done, and did threaten, and still does threaten, to take away and remove said pipes and appurtenances, to the constant annoyance, vexation, and distress of this plaintiff, and doth by his said acts and threats make the value of this plaintiff's right to steam by virtue of his said lease of no account, and doth utterly divest the said covenants to furnish steam of all value in market either for sale or lease.

And plaintiff further says that, but for the threats of said defendants and the said acts of Congress, said right to steam would be worth a great sum, viz, $1,000 00 and upwards, and that said pipe is laid
172 in the ground, and if taken out could not be replaced except at great expense during the winter; and further, that by means thereof the lodging-rooms in said house are heated, and the removal of said pipes would destroy the value of all the heating arrangements now in daily use in said building.

And this plaintiff further states that the pipes and connections of the said alcohol still are the true and proper appurtenances of the said alcohol house, erected and placed in a proper and legal manner for the prosecution of a lawful business for the following reasons, viz: That in the year 1867, the owner of the adjacent distillery, having become convinced (as this deponent is informed and verily believes) that the manufacture of high-wines from grain could not be made a profitable business under existing laws; that the high-wines were a crude article, and only valuable in market because purchased for the purpose of redistillation and refinement into alcohol, cologne, spirits, and other fine spirits of grea value for medicinal, mechanical, and other general consumption; and that the manufacture of such pure or refined spirits by distillation from grain, and immediate redistillation, was profitable if care-
173 fully and economically conducted, did conclude to convert the said establishment into a manufactory of such pure and refined spirits, by the addition of such stills, works, and machinery as were necessary thereto; and because the statutes of the United States did

forbid the erection of rectifying and refining works on the same premises with a distillery, (by enactment, which the plaintiff believes void,) the said owner, in conformity therewith, and in compliance with all the requisitions and directions of the Revenue Department, did erect a building across a street, and two hundred feet distant from said distillery, and did place therein the alcohol works in question, and arrange the same at a cost of about thirty thousand dollars; and because alcohol and pure spirits are very *inflamable*, and the place where the same are manufactured, stored, or handled, liable to become filled with explosive vapors and gases, did arrange so that no fires need be built in or about said alcohol house, by connecting the same by steam-pipes with the steam-boilers of said distillery, and taking steam through said pipes to run said alcohol works and heat the lodging-rooms for the watch-
174 men and other persons connected therewith, and the office and barreling-rooms, and thereby did save very heavy expenses of insurance, amounting, as this plaintiff believes, to more than six per cent. on the value of the buildings, works, and contents per annum, viz, more than $1,800 00; and also did save the expense of an extra boiler, arch, and stack, amounting to more than $2,500 00, and the expense of a large fire thereunder, and the wages of the firemen; and said owner did also lay water-pipes, properly connected with pumps, to force the water from springs, and a stream adjacent thereto, into said alcohol works, and did also lay waste-pipes to carry away all waste fluids, all which pipes were placed as appurtenant to said alcohol works, and for the prosecution of the lawful use thereof in a lawful manner, and for no other purpose.

And this plaintiff further states that it is necessary to a complete alcohol works to have steam-pipes connected with steam-boilers, and water-pipes connected with a large supply of cold water, and ducts or means to carry away waste fluids; and that without steam the distillation cannot be carried on, and without water it would be impos-
175 sible to condense or obtain alcohol by distillation; and drains and gas-pipes are appurtenant, as is well known, to all the buildings where waste fluids collect or gas can be obtained.

And this plaintiff further shows that there are now connected with said alcohol works no other pipes than the water and steam pipes aforesaid laid and connected only as aforesaid except a gas-main connected with gas works adjacent to said alcohol house, and at a distance from said distillery; and said works, alcohol manufactory, and appurtenances having been completed about the first day of January, A. D. 1868, the same, including both said distillery and alcohol works, with the steam-pipes and water-pipes connected with said springs, were approved by the Revenue Department of the United States, taxed and licensed, and run for many months prior to July, 1868.

And this plaintiff, not being able to carry on the whole establishment, did lease, as set forth in said bill, the said lands and alcohol house, with the appurtenances and steam to be furnished as in said bill of complaint alleged.

And thereafter the said statute of July 20th, 1868, having been passed, the owner of said property did let the distillery aforesaid, with
176 the cattle-barns and appurtenances, reserving and taking a covenant from the lessee thereof that he would furnish this plaintiff steam from the steam-boilers of said distillery in accordance with the terms of his said lease. And thereupon said lessee paid the license tax, and obtained a license for said distillery, and is now running the same.

And this plaintiff further stafes that he intends, and is about to give

the notice of his intention, to run said alcohol works or rectifying establishment as required by the statute set forth in his said bill, (except that said notice will state that said rectifying establishment is 200 feet from a licensed distillery,) and to tender to the said Allen, collector, he being the collector of the district where said premises are situated, the license tax upon such rectifying establishment, and thereupon to connect the pipes and portions of said alcohol works where the same were disconnected and dismantled by the authority and direction of said defendants, as above set forth, and put said works in order and run the same as a rectifying establishment, and use the same for the business of rectifying, which business said plaintiff avers is a lawful business, and will be carried on by said plaintiff in a legitimate and correct manner, as a means of livelihood and profit, like any other trade, business or vocation in which men engage.

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And this plaintiff further states that he is informed, and verily believes, that said Allen, as collector, intends to refuse to accept the said tax, and that the said collector, and said Ferguson, assessor, do intend, and threaten forthwith to seize said alcohol house, and interfere by violence and force with this plaintiff and his employees in said alcohol house, and to seize the property of this plaintiff, and the product of his said rectifying establishment, wherever the same may be, and to harrass and destroy this plaintiff.

And this plaintiff states that in dismantling said still as aforesaid, and in the other interferences, commands, threats, and doings to prevent the use of said alcohol still, the said defendants do attach and destroy the property and rights of this plaintiff acquired under and in pursuance of the statutes of the United States; and if the acquisition or use of a rectifying establishment, within six hundred feet of a licensed distillery, can, in any event, be a crime or contrary to law, the statute in this behalf is as to the alcohol works aforesaid ex post facto, and any proceeding against this plaintiff thereunder would be & is a trespass.

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And this plaintiff further states that he is informed, and verily believes, that said defendants, and each and every one of them, would be deeply insolvent and bankrupt if called upon to answer for the trespasses they have already committed, and the liabilities they have incurred, and that personal judgments against them for his damages in this behalf would be of no value; that their trespasses upon said works, and acts of usurped authority over the same, are frequent and harrassing, and for the above reasons, as well as for the reasons set forth in said bill, are working irreparable injury to this plaintiff.

And plaintiff further states that from the first day of November last to this time he has been prevented from running said alcohol works and using the same by the seizure and dismantling thereof, as above set forth, by said defendants Allen and Ferguson, as officers aforesaid, and that during all said time all of said defendants have exercised authority over the same, under color of said void acts of Congress, and by virtue of no other warrant, or process, or authority whatever, and that said defendants still do exercise control and authority over the same, and do prevent by color of said acts, and by no other authority whatever, the use of said works for the purposes of rectifying as aforesaid, and manufacturing alcohol and pure and refined spirits. And this plaintiff verily believes that in starting and running said works as he is compelled to do, without the protection of this court, unless the injunction prayed is granted, he will come into actual collision with said officers or their agents, and will be compelled to protect himself and his

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property in the prosecution of his lawful business, in the manner aforesaid, with force and arms, and at great peril to himself.

And this plaintiff further states that the said alcohol house is built above the ground, and none of said works are in any manner concealed; that the building is separate and apart from all other buildings by roadways, streets, and commons or vacant lands of considerdble extent; that it has no cellar, and the basement is entirely above ground at one of the building and partly above at the other, and that said building and works are accessible from every side.

180 Therefore this plaintiff prays that he may be permitted to pay said license tax into court, and that during the pendency of this suit the said defendants may be restrained by injunction, according to the prayer of said bill, and that such other or further orders may be made as in the premises shall be just, and that a mandamus may issue commanding said assessor to assess, and said collector to collect and receive, the said special or license tax upon said rectifying establishment, and to license the same.

LEMUEL W. MASON.

STATE OF ILLINOIS, *County of Kane, ss:*

Lemuel W. Mason, being first duly sworn, doth depose and say that he is the plaintiff in the above-entitled suit; that he has read the draft of amendments to his bill of complaint therein, which draft is the draft above written and signed by this deponent; and that all the facts stated in the said draft are true, to the knowledge of this deponent, except the matters therein stated on his information and belief, and as to those matters he believes it to be true.

LEMUEL W. MASON.

181 Sworn to & subscribed before me this 6th day of January, A. D. 1869.

JOHN COX,
Justice of the Peace.

(Endorsed:) Filed March 31, 1869. W'm H. Bradley, cl'k.

On this day, to wit, the 13th day of December, A. D. 1869, came said complainant by his solicitor, and filed in said clerk's office his supplemental bill in said entitled cause; which said supplemental bill is in the words and figures following, to wit:

Supplemental bill.

United States circuit court, northern district of Illinois, ss:

LEMUEL W. MASON, PLAINTIFF,
vs.
EDWARD A. ROLLINS, COMMISSIONER OF THE Internal Revenue; William B. Allen, collector; and Duncan Ferguson, assessor, defendants. } Supplemental bill.

To the honorable judges of said court:

Humbly complaining, showeth unto your honors, your orator,
182 Lemuel W. Mason, that on the day of November, A. D. 1868, your orator exhibited his original bill of complaint against the said defendants, and which said bill has been amended by order of this honorable court, thereby praying, among other things, that a man-

damus may issue commanding said assessor to assess, and said collector to collect and receive, the special or license tax upon the rectifying establishment mentioned in said bill, and to license the same.

And your orator further showeth, by way of supplement, that since the filing of his said original bill, your orator gave to said assessor notice of his intention to run said rectifying establishment or alcohol works, and in said notice did comply with all requirements of the statute except that said notice stated that said rectifying establishment was 200 feet from a licensed distillery. And your orator requested said assessor to assess the special tax upon said rectifying establishment. And said assessor admitted and acknowledged that your orator's notice was in all respects sufficient save only that it stated said rectifying establishment to stand 200 feet from a licensed distillery, and for
183 that reason, and that only, said assessor refused to assess said special tax thereon.

And thereupon your orator applied to said collector, he being the collector of the district wherein said alcohol house or rectifying establishment is situated, and tendered to said collector the sum of $200 00, being the amount of the special tax upon said rectifying establishment, and demanded of said collector a license for the same. And your orator has ever since been and now is ready to pay said special tax, and hath often requested said assessor to assess, and said collector to receive the same, and to license said rectifying establishment, and was in hopes that said assessor and collector would have complied with his fair and reasonable request, as in justice and equity they ought to have done.

But now so it is, may it please your honors, that the said assesor refuses to assess said tax, and said collector refuses to collect the same, and to license said rectifying establishment, and do maintain and continue their authority over and supervision of said premises and rectifying establishment, and do forbid and prevent your orator from
184 using the same, to the manifest wrong and injury of your orator in the premises.

To the end, therefore, that the said defendants may, if they can, answer in the premises, and show cause, if any there be, why a mandamus should not issue commanding said assessor to assess, and said collecter to collect, said special tax, and license your orator's said rectifying establishment, and that said defendants may be restrained by injunction, and that your orator may have full and perfect relief, according to the prayer of his said bill:

And your orator further states, upon his information and belief, that Columbus Delano hath been appointed Commissioner of the Internal Revenue, as successor to said Rollins, and doth continue and enforce all the rules regulations of said Commissioner Rollins, and gives out that he will execute the said acts of Congress mentioned in the said bill of complaint herein, and will prevent your orator from using said alcohol house as a rectifying establishment:

May it please your honors to grant unto your orator, not only a
185 writ of mandamus commanding said assessor to assess, and said collector to collect, the special tax upon your orator's said rectifying establishment, and to license the same, but also an injunction commanding said defendants to desist and refrain from interfering with your orator and his said property, according to the prayer of his said bill; and also a writ of subpœna, to be directed to the said William B. Allen, collector, and said Duncan Ferguson, assessor, thereby commanding them, and each of them, at a certain time and under a certain pen-

alty therein to be limited, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, abide, and perform such further orders, direction, and decree as to your honors shall seem meet.

LEMUEL W. MASON,
By E. ROBY, *his Sol'r.*

EDWARD ROBY, *Pl'ff's Sol'c'r.*

STATE OF ILLINOIS, *County of Cook, ss:*

Lemuel W. Mason, the above-named plaintiff, being first duly
186 sworn, saith that he has heard read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on his information and belief, and as to those matters he believes it to be true.

LEMUEL W. MASON.

Sworn to before me this 20th day of April, A. D. 1869.

JOHN MAGOUN,
Notary Public.

(Endorsed:) Filed Dec. 13, 1869. W'm H. Bradley, cl'k.

On this day, to wit, the 13th day of December, A. D. 1869, came said defendants by the district attorney, and filed in said clerk's office their demurrer in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois, of the December term, 1869, in chancery.

187 LEMUEL W. MASON, COMP'T,
vs.
EDWARD A. ROLLINS ET AL., DEFENDANTS. } Amended bill & supplemental bill.

These defendants by protestation, not confessing all or any of the matters and things in the said complainant's amended & supplemental bills contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bills, and for cause of demurrer show that the said complainant has not by his said bills made such a case as entitles him in a court of equity to any discovery from these defendants, respectively, or any of them, or any relief against them as to the matters contained in the said bills, or any of such matters, and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said bills, or any of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bills, nor entitle the said complainant to any relief in
188 this court touching any of the matters therein complained of.

Wherefore, and for divers other good causes of demurrer appearing in the said bills, these defendants to demur thereto, and they pray the judgment of this honorable court whether they shall be compelled

to make any further and other answer to the said bills, and they humbly pray to be dismissed from hence, with their reasonable costs in this behalf sustained.

JESSE O. NORTON,
Def'ts' Sol.

(Endorsed:) Filed Dec. 13, 1869. W'm H. Bradley, cl'k.

On this day, to wit, 15th day December, A. D. 1869, in the record of the proceedings of said court in chancery is the following entry, to wit:

LEMUEL W. MASON *vs.* EDWARD A. ROLLINS, COMMISSIONER OF THE Internal Revenue; W. B. Allen, collector; and Duncan Ferguson, assessor.	Chancery.

The court, having considered and being now fully advised upon
189 the demurrer of the defendants to the amended and supplemental bills of complaint filed herein, sustains said demurrer, and *ordes* that the bills herein be dismissed at the costs of the complainant.

It is thereupon considered and adjudged by the court that the defendants do have and recover of the complainant their costs and charges by them about their defence in this behalf expended, amounting to the sum of one hundred and fifty-three dollars and thirty cents, and that they have execution therefor.

And thereupon the complainant, by his attorney, prays an appeal to the Supreme Court, which said appeal is allowed to complainant upon his filing bond herein in the sum of five hundred dollars, with security, to be approved by the court.

On this day, to wit, the 31st day of December, A. D. 1869, came said complainant by his solicitor, and filed in said court, with the clerk thereof, his appeal bond in said entitled cause; which said bond is in the words and figures following, to wit:

Appeal bond.

Circuit court of the United States for the circuit and northern district of Illinois.

LEMUEL W. MASON *vs.* 190 EDWARD A. ROLLINS, COMMISSIONER; William B. Allen, collector; Duncan Ferguson, assessor; Columbus Delano, Commissioner, of the Internal Revenue.	Appeal from decree in chancery.

Know all men by these presents that we, Lemuel W. Mason and John Davis, of the city of Chicago, county of Cook, and State of Illinois, and of the northern district of Illinois, are held and firmly bound unto the above-named Edward A. Rollins, Commissioner, &c.; William B. Allen, collector; Duncan Ferguson, assessor; and Columbus Delano, Commissioner, in the sum of five hundred dollars, to be paid to the said Rollins, Allen, Furgason, and Delano, their executors or administrators; to which payment, well and truly to be made,

we bind ourselves and each of us, jointly and severally, and our heirs, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 21st day of December, A. D. 1869.

Whereas the above-named Lemuel W. Mason hath prayed for
191 and obtained an appeal to the Supreme Court of the United States to reverse the decree entered in the above-entitled suit by the said circuit court:

Now, therefore, the condition of this above obligation is such, that if the above-named Lemuel W. Mason shall prosecute his said appeal with effect, and pay all costs which may be awarded against him, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

LEMUEL W. MASON. [SEAL.]
JOHN DAVIS. [SEAL.]

STATE OF ILLINOIS, *County of Cook, ss:*

John Davis, being first duly sworn, says that he is a freeholder in and resident of said county, and that he is worth more than five thousand dollars in property liable to execution in said county over and above all his debts and liabilities, which he owes or has incurred.

Sworn to before me this 31st day of December, A. D. 1869.

JOHN MAGOUN,
Notary Public.

Satisfactory:

J. O. NORTON.

Approved:

THOMAS DRUMMOND.

(Endorsed:) Filed Dec. 31, 1869. W'm H. Bradley, cl'k.

192 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein Lemuel W. Mason is complainant, and Edward A. Rollins et al. are defendants, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in the city of Chicago, in said district, this eleventh day of May, A. D. eighteen hundred and seventy, and of our independence the ninety-fourth year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

193 United States of America, in the Supreme Court, ss.—December term, A. D. 1870.

LEMUEL W. MASON, APPELLANT,
vs.
EDWARD A. ROLLINS ET AL., APPELLEES. } Appeal from seventh circuit.

And now comes the said appellant, and says that in the foregoing record and proceedings there is manifest error in this, to wit:

The circuit court erred—

(1.) In overruling the applications for injunction as prayed in said bills.

(2.) In refusing the mandamus prayed.

(3.) In sustaining the demurrer of said appellees, the defendants in said record.

(4.) In dismissing said bills of complaint.

(5.) In rendering judgment against the appellant therein.

Wherefore this appellant prays that the said decree may be reversed, and that this court may grant to him such other and further relief as justice shall require.

LEMUEL W. MASON.

EDWARD ROBY,
Counsel, 11 *Tribune Building, Chicago. Ill.*

(Indorsement on cover:) No. 273. Lemuel W. Mason, appellant, vs. Edward A. Rollins, Commissioner of Internal Revenue, et al. N. Illinois C. C. U. S. Filed 31st October, 1870.

Supreme Court of the United States.

No. 274.—MASON v. MANN ET AL.
No. 275.—MASON v. HART ET AL.
No. 434.—UNITED STATES v. SINGER ET AL.
No. 435.—UNITED STATES v. VAN BUSKIRK ET AL.

Distinction between direct taxes, and duties, imposts and excises.

Having referred the Court to the Briefs filed by me in No. 434, U. S. v. Singer et al., and No. 435, U. S. v. Van Buskirk, I now present, by additional authorities, only one point or phase of the cases, viz:

If this tax violates either the rule of Uniformity or of Apportionment it is void: that is, if it is a direct tax it cannot be laid except in proportion to the census; if a duty, impost or excise, it must be uniform.

As there exists no property to tax; only a deficiency; a nothing, and yet a person is required to pay, we will analyze the subject to ascertain to which class it belongs. First premise, from the derivation of the word TAX, from *Taxo*, or more properly *Tango;* to touch or take from, (Scheller Latin Dic.,) includes every revenue which can be taken from the citizen for the support of the state.

TALLAGIUM; "from the French *tailer;* to share or cut out;" * * this "is a general word and doth include all taxes."—(2 Co. Inst., 532.)

It will be seen that at the early period when this word was used thus, there were no taxes except those laid upon persons with respect of their property. Villeins were slaves, and free men without property were the personal

retainers of the knights, who were taxed by the number of knights' fees owned, socage tenants by annual value, burghers, &c., by annual income or personal property.

Excise: Must of necessity have meant to cut out; and of like necessity must have applied only to property.

Imposts: from *impono;* to place upon; in the old law written impositions; could of course have covered any burden laid upon a person or property, but in its application we shall see that it was limited to property.

Duty: derived from the feudal system; the render of feudal services and aids on account of tenements held. This word was finally extended to include all taxes on property, and to express the reciprocal of impost. The command of the sovereign imposing a reciprocal duty on the citizen in respect of his property.

We shall find that all duties, imposts, and excises, laid on persons in respect of their property, were from the beginning of English history, at all times and without exception, proportioned by some rule of uniformity.

And as capitation taxes had grown up with the emancipation from feudal bondage; recognizing the equality of all in the eye of the law, the equal share of every man in the right to govern, and the equal duty of every man to contribute equally, if called upon as a man to support the state; our Constitution requiring all taxes of that nature to be apportioned or assessed or laid in proportion to the census. The nature of the tax, and not the name by which it might be called, whether Poll tax, or Military tax, or Police tax, or Family tax, or by a name that denominated nothing, as assize or charge, was to control the application of the rule. Any tax laid upon the person, whether upon his head or foot or body, or in any other metaphor, was of the same class.

And we shall see that this was a mere recognition of a distinction which we find in the law books from the decline of the feudal system, between taxes on persons and taxes on persons in respect of their property.

In the former of which cases the persons are certainly taxed, in the latter they are not taxed, only the property, and this distinction is recognized in Dobbins v. Comm'rs of Erie County, (16 Peters, 435,) yet it imposes a duty and thus reaches the person.

(Of course it will be remembered that in the dark ages the use of words cannot be expected to be more perfect

than at present, and we cannot grade their meanings to the fineness of a hair; they are often used inaccurately, but the unanimity of the general result is astonishing.)

"*Land Tax.* A tax imposed in Great Britain on lands "and tenements, and on personal property by acts for- "merly passed annually for that purpose."

"The assessment or valuation of estates hereafter men- "tioned made in the year 1692, though by no means a "perfect one, had this effect, that a supply of half a mil- "lion sterling was equal to 1*s.* in the pound in the value "of the estate given in. And according to this valuation, "from the year 1693 to 1798, the land tax continued an "annual *charge upon the subject* above half the time at 4*s.* "in the pound; sometimes at 3*s*; sometimes at 2*s*; "twice at 1*s*, (A. D. 1732 and '3); but without any total "intermission.

"By statute 38, Geo. 3, c. 60, this tax as imposed by "the last annual act, 38 Geo. 3, c. 5, on lands and tene- "ments in Great Britain, is made perpetual, being fixed "under that act at 4*s.* in the pound.

"*A duty* of 4*s.* in the pound on pensions, offices, and "personal estates in England and Wales has, since that "time, been annually granted."

(*Tomlin's Law Dictionary.*)

That this word *duty* is not here used inadvertently will become apparent. The following expressions show that the tax was considered as laid upon the land or property itself: "By the act of 38 Geo. 3, c. 60, the land tax so "by that act made perpetual is also made subject to "*redemption* or *purchase* either by the owner of the land "liable to the tax, or on failure of redemption by him "within certain periods, then by any other person inclined "to purchase."—(Ibid.) Our authority proceeds: "By "the 4 and 5 W. 4, c. 11, continuing the *duties* on offices "and pensions, *those* on personal estates having been "taken off, * * * are placed to the account of the "consolidated fund."

"The ancient method of taxation was by *escuage*, which "was on land held by *knight service*, and by *talliage* on the "cities and boroughs.

* * * * * * *

"King Edward 1 confirmed to the people magna "charta which they had long contended for, and also the "charter of the forests; and for magna charta they

"granted the king a fifteenth by the name of quindeci-
"mam partem ominum honorum. * * *

"We find, in the times of Henry 8, Queen Elizabeth,
"and James 1, they raised both subsidies and fifteenths.
"This was because the value of things increased, and
"therefore the old fifteenths were not according to the
"then true value of the townships; and therefore they
"contrived that the subsidy should be raised by a pound
"rate upon lands, and likewise a pound rate upon goods."

This word *rate* is to be observed, as we shall find it used interchangeably with *charge*, and with our use of the word tax, though its specific use is to designate a tax according to numbers or values.

From the continuance of the quotation we would see that "after the Revolution, to support King William in
"his wars with France, it was necessary to come into a
"land tax, and from 1684 to 1693 the tax was made by a
"pound rate like the former subsidies, * * *
"and then they came to lay a rate on every county," and thus came to lay disproportioned sums on some counties.

In the same dictionary, title TENURE II, 6, we find:
"AIDS, called by *Spelman* (Treatise on Feuds, 59) tribute,
"and by our old authors *auxilia*, were mere benevolences
"rendered by a tenant to his superior or lord in times of
"difficulty or distress.—(*Bracton lib.* 2, c. 16, § 8. Fleta
"*lib.* 3, c. 14, § 9.) These were not of direct feudal obli-
"gation, but first obtained out of regard to the person
"and occasions of the lord. * * * But as
"*aids* grew frequent they became, in many counties, *es-*
"*tablished renders of duty.* * * Two usual aids
"were fixed (by Statute, *Westm.* 1, c. 36. Extended by
"25 *Edw.* 3, c. 11, to aids required by the king,) as fol-
"lows, viz: the aid of a knight's fee at 20*s.*, and of socage
"lands of 20*l.* per annum at 20*s.*, and so pro rata.

* * * * * * *

"8. ESCUAGE is reckoned by *Lord Hale* among the per-
"quisites of tenure.

* * "It was a pecuniary aid or contribution
"reserved by particular lords instead or in lieu of per-
"sonal service, the better to enable them to bear the ex-
"traordinary expense of their own attendance and warfare
"when the king made war on Scotland or Wales or upon
"any foreign country, if the tenure so was expressed.—
"(*Bract. l.* 2, *c.* 16; *Litt.*, §§ 95, 97, 100, 103, 155, 158; *Mad.*

"*Hist. Ex.*, 452; *Seld Notes ad Hengham*, 113.) * *
"It was usually proportioned to the fine received by the "king from his *tenants in capite* for failing to attend in "such expeditions.—(*Fleta lib.* 3, fol. 198.) * *
"Our kings anciently * * did sometimes, on "occasion of war, without summons, assess a moderate "sum upon each knight's fee as a scutage or escuage by "which they might be enabled to provide stipendaries. "But * * in the time of King John * * his charter "declared that no escutage should be imposed or assessed "*nisi per commune concilium Regni.*—(See *Litt.*, § 97; 1 "Inst. 72, *a*; *Magna Charta Cap.*, 37.)"

This review has brought us back to the feudal origin of this word, which our author thus defines: "DUTY.— "Anything that is known to be due by law, and thereby "recoverable, is a duty before it is recovered, because the "party interested in the same hath power to recover it.— "(1 *Lil.*, 495.)"

This is the only definition given by Tomlin to this word, and has the weight of contemporaneous construction touching the matter we are considering.

In Comyns' Digest, title DETT, (G. 1,) we read: "Every "person, who by any means is chargeable to the king, "shall be debtor to the king, for it shall be taken exten- "sive, as where he is answerable to the king for debt, "damage, duty, rent, arrear, &c.—Goldb., 295." (See also 2 Strange, 981; M., 1726; Bunb., 223; Comyn Dig. DETT, G. 7; G. 13; G. 14.)

(IBID.,) *title* HOMAGE (E) *Escuage.*

"He that holds his lands by escuage holds by knight "service."

"The services of chivalry proper were all personal, but personal attendance growing inconvenient, the tenants found means of compounding for it. This pecuniary satisfaction at last came to be levied by assessments at so much for every knight's fee; scutum being then a well-known denomination of money. It was called in Norman French escuage, being a pecuniary instead of a military service.—(2 Bl. Com., 74.)

The first time this appears to have been taken was in the 5 Hen. 2, on account of his expedition to Toulouse; but it soon came to be universal that personal attendance fell quite into disuse.

Hence we find in our ancient histories that, from this

period, when our kings went to war they levied *scutages* on their tenants, that is, on all the land-holders in the kingdom, to defray their expenses and hire troops.

Magna Charta provided that no scutage should be imposed without consent of parliament, such scutages being indeed the groundwork of all succeeding subsidies and the *land tax* of later times. Since, therefore, escuage differed from knight service in nothing but as a compensation differs from actual service, knight service is frequently confounded with it."—(2 Bl. Com., 74, 75.)

This identifies the payment of a land tax, with the duty of a subject to his sovereign on account of the land which he holds: and is the substitution of the modern revenue for the former personal assistance.

Blackstone in his Commentaries (written about 1758) says (1 Com., 308) "The taxes which are raised upon the "subject are either annual or perpetual. The usual an- "nual taxes are upon land and malt."

The form of the expression will be observed the taxes laid upon land and malt are taxes laid upon the subject.

"The land tax in its modern shape has superseded all the "former methods of *rating* either property or persons "with respect to their property."—(Ibid.)

In the subsequent pages we find the land tax considered as a rate of charge, of so much in the pound of value. And that a land tax is in fact revenue *paid by the subject* to the *sovereign*, superseding tenths, fifteenths, hydages, scutages and talliages (tenths and fifteenths being temporary aids issuing out of personal property): is a rate upon property, charged to persons in respect of their property; due from them; collectible by an action of debt: or the more summary methods of imprisonment of the body, distress of goods or sale of the estate in the land itself, because it is a duty.

"The perpetual taxes are—

"I. The Customs; or the duties toll tribute or tariff "payable upon merchandise exported or imported."—(Id., 313.)

"II. Directly opposite in its nature to this is the Excise "*duty* which is an inland *imposition*, &c."—(Id., 318.) Mr. Blackstone uses terms with accuracy. His ideas of sound policy in government were those of a mere sycophant to royalty and landed aristocracy (2 Dallas, 458) therefore we omit the remainder of this section.

"III. I proceed therefore to a third duty, namely, that "upon salt; which is another distinct branch of his majes- "ty's extraordinary revenue, and consists of an Excise of "3*s.* 4*d.* per bushel on all salt by several statutes of King "William and other subsequent reigns. It is not gener- "ally called an Excise because under the management "of different commissioners; but the commisioners *of the* "*salt duties* have, by statute 1, Anne, c. 21, the same "powers, and must observe the same regulations, as those "of other Excises."—(Id., 321)

"IV. Another considerable branch of the revenue is "levied with greater cheerfulness, as, instead of being a "burden, it is a manifest advantage to the public. I mean "the post office *or duty for carriage of letters.*"—(Ibid.)

"V. A fifth branch of the perpetual revenue consists "in *the stamp duties*, which are a tax imposed on all parch- "ment and paper whereon any legal proceeding or private "instruments of almost any nature whatsoever are writ- "ten; * * these *imposts* are very various according to the "nature of the thing stamped. * * In France and "some other countries *the duty* is laid on the contract "itself, not on the instrument in which it is contained. "* * The first institution of the stamp duties was by "statutes 5 & 6 W. & M., c. 21, and they have since, in "many instances, been increased to ten times their orig- "inal amount."—(Id., 323.)

Here we see the two generic terms used interchange- ably. An impost by the sovereign being the origin of the duty of the subject. Either word is used to express the same fact in its accomplishment.

The word stamp duties have a familiar sound, and re- flection or examination shows us clearly that colonial writers substituted the word tax for duty, because they denied the power of the government in which they were not represented to lay the tax, and repudiated the idea that that government could impose the duty of payment. They admitted that if represented in the government the reciprocal duty would have accrued. To-day no impost contains more of the insignia of this reciprocal duty than that which requires the citizen, in addition to his pay- ment to the revenue, to affix and cancel the evidences of payment upon a thousand articles which may remain in the most perfect obscurity.

"VI. A sixth branch is *the duty* on houses and windows.

"As early as the Conquest, mention is made in domesday "book of fumage or fuage, vulgarly called smoke-far- "things; which were paid *by custom* to the King for every "chimney in the house. And we read that Edward the "Black Prince, (soon after his successes in France,) in "imitation of the English *custom* imposed a tax of a florin "upon every hearth in his French Dominions. But the "first parliamentary establishment of it in England was "by statute 13 and 14, Car. II., c. 10, whereby an heredi- "tary revenue of 2*s.* for every hearth, in all houses pay- "ing to church and poor, was granted to the King for- "ever. And by subsequent statutes for the more regu- "lar assessment of this tax, the constable and two other "substantial inhabitants of the parish, to be appointed "yearly, (or the surveyor appointed by the crown, to- "gether with such constable or other public officer,) were, "once in every year, empowered to view the inside of "every house in the parish. But upon the revolution by "statute 1, W. and M., st. 1, c. 10, hearth money was "declared to be 'not only a great oppression to the poorer "'sort, *but a badge of slavery upon the whole people, exposing* "*'every man's house to be entered into and searched at pleasure* "*'by persons unknown to him;* and therefore to erect a last- "'ing monument of their majesties' goodness in every "'house in the Kingdom, the duty of hearth-money was "'taken away and abolished.' This monument of good- "ness remains among us to this day; but the prospect of "it was somewhat darkened when in six years afterwards, "by statute 7, W. 3, c. 18, a tax was laid upon all houses "(except cottages) of 2*s.*, now advanced to 3*s.*, per annum, "and a tax upon all windows if they exceed nine in such "house. Which rates have been from time to time varied, "being now extended to all windows exceeding six; and "the power is given to surveyors appointed by the crown "to inspect the outside of houses, and also to pass through "any house two days in the year, into any court or yard "to inspect the windows there. *A new duty*, from 6*d.* to "1*s.* in the pound, was also *imposed* by statutes 18, "Geo. III., c. 26, and 19 Geo. III., c. 59, on every dwel- "ling house inhabited, together with the offices and gar- "dens therewith occupied: *which duty*, as well as the "former, is under the direction of the Commissioners of "the Land-Tax."—(Ibid., 324.)

(This whole section, passing somewhat beyond the line

of our present argument, is quoted for its dismal picture of the condition of the people under the Revenue law of July 20, 1868. If their inquisition was "a badge of slavery upon the whole people," the enormities delineated in the case of Mason v. Rollins pass beyond the expression of superlative words; yet it was the inspiration of the revolution of 1688 and of this statute which removed "the badge of slavery," that dictated every line of the Constitution ordained to secure the blessings of liberty.)

Upon this we note, (1) that houses are essentially real estate in England; and a part of the land; as the house and its windows are incapable of severence a tax laid upon a house or window is essentially a tax on land, and in the last clause it is extended over the garden and curtilage. (2) This land tax is denominated a tax and described as coming clearly within the generic term duty. (3) The term duty is used as interchangeable with the other generic word impost in describing the tax.

"VII. The seventh branch of the extraordinary perpetual revenue is *a duty* of 21*s.* per annum for every male servant retained or employed." * * *

"VIII An eighth branch is *the duty* arising from licenses to hackney coaches." * * * * *

"IX. The ninth and last branch of the King's extraordinary perpetual revenue is *the duty* upon offices and pensions; consisting in an annual payment of 1*s.* in the pound (over and above all other duties) out of all salaries, fees, and perquisites of offices and pensions payable by the crown, exceeding the value of 100*l.* per annum. This highly popular taxation was imposed by statute 31, Geo. 2, c. 22, and is under the direction of the Commissioners of the Land-Tax."—(Ibid., 326.)

"All contributions *imposed* by the Government *upon individuals* for the service of the state, are called taxes:—by whatever name they may be known, whether by the name of tribute tythe talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name."—(Story Const., §950.) We follow this author no farther in this section, though undoubtedly this sentence receives the approval of our judgment. Of the other words we have seen that "tallagium is a general word and doth include all taxes" then used.—(2 Co. Inst., 532.)

In Radford v. McIntosh (3 T. R., 632) the taxes on post-horses are denominated duties. So also in 6 T. R., 163,

11 East., 530; 8 East., 581, and case of The King v. Swift in the Exchequer given in the note; 8 East., 584; 1 Price, 317; 3 B. & Ald., 387; 1 B. & Ald., 166. See statement of this case.

"RATE. The valuation of every man's estate, or the "appointing or setting down how much every one shall "pay or be charged with to any tax."—(*Tomlin's Law Dic.*)

In *The King v. Brown* (8 East., 528) the word is used, and having seen in the earlier part of this subject of duties that the land tax is by valuation, we understand the force of the decision that "the estate that has once paid shall not be made to pay again," no matter how many subordinate estates there might be in the farm; the payment of the rate on the whole farm was required of the farmer, and payment extinguished the tax.

In the *King v. Sherborne* it was determined that the defendants were not ratable for stock which was bailed to them operis faciendi.

(See also on county rates, 3 B. & A., 72; on rating for parochial taxes, 2 B. & Ald., 570; on rating in respect of personal property having its actual situs in a parish, though not corporeally present, 1 B. & Ald., 109; on rating canal lands and personal property in proportion to other lands adjacent, 1 B. & Ald., 289.) 1 B. & Ad., 113. From the opinion of Garrow *Baron* in Attorney General v. Coote (4 Price, 183), on the application of "the Property Tax Act," which charges *a duty* of 1*s.* in the pound, on the annual profits or gains arising to any person residing in Great Britain; it seems that this *duty* is a tax on property at a certain rate.

See also on the use of this word 3 B. & Ald., 21, 454; 1 B. & A., 42.

In the articles of union with Scotland, by Art. 7, Excises on liquors shall be uniform throughout the United Kingdom. By Art. 9. When the land tax in England is 1,997,763*l.* 8*s.* 4½d. Scotland's quota shall be 48,000*l.* free of all charges; and so proportionably to be collected as the Cess now in Scotland.

And by Art. 8, Scotland shall be exempt from *the duty* on home-made salt.

So by Art. 10, from the duties on stamped paper, etc. by the acts then in force.

By Art. 11, from duties on windows and lights, which determine 1st August, 1710.

By Art. 12, from duties on coals, etc., till 1710.

By Art. 13, from duty on malt till 1707.

By Art. 14, from all other duties laid before the union except those consented to in this treaty.

So by Art. 15, Scotland shall have 398,085*l.* as an equivalent for the *customs* and *excises* with which Scotland after the union will be liable towards the debts of England. —(Comyn's Dig., title Scotland (D. 8.)

The Commissioners of sewers are authorized to tax, assess, charge, &c., *after the quantity of their lands*, tenements, rents by the number of acres, &c., after the rate of every man's portion, profit, &c.

Comyn's Digest, title SEWERS, E. 2, (10 Co. Rep., 143.) Title "(E. 3.) When the charge shall be upon the owner" shows that when the tenure is to repair the owner shall be charged alone. So also when he has the land in his own right. But the fact that he and his ancestors have always repaired is not evidence of a tenure or prescription to repair; it is only evidence that the land is liable.

For non-payment of the assessment the remedy is by distress, by fines, amercements, etc., and by sale of the lands.—(Ibid., E, 6; E, 7; E, 8.) But the land cannot be sold "when the assessment is laid upon the land without naming the owner, *for some person ought to be assessed for such land.*"—(Ibid., E, 9; Callis, 162.) A "decree of the Commissioners for the sale * * shall bind all persons who at the making of the decree had interest in such lands in possession, reversion, or remainder. A feme covert, infant, and non compos will be bound."—(Ibid., E, 10.)

Stamp tax is classed as an *advalorem duty* on a lease, etc. (4 M. & S., 23; 2 M. & S., 88; 4 Taunt., 876; M. & S., 228; 4 B. & A., 204; legacy *duty*, 7 Price, 560. Advalorem stamp duty on a deed, 5 M. & S., 228; 1 B. & A., 477.)

Customs. This was the specific term by which import and export duties were denominated from *Rolle* down to the present —(See quotations ante. Also Comyn's Digest, title TRADE, A, 1; A, 5; St. 3 Jac., 6; C, 1; C, 2; C, 3; C, 5; C. 5 b. is of "other duties," showing the synonym. 13 East., 506. 2 Blk., 1018. Loft., 204, 205.)

TYTHE: Comyn's Dig., title *Dismes.*

Tithes are included in the definition of taxes, and, having their origin in the system where the church was a state establishment, and its several divisions supported by this tax on specific divisions of territory, it becomes clear, from the examination of this title, that it was a tax attached to the land or territorial jurisdiction nearly uniform as to its application to all kinds of property which yield profit.—(See F, 1; F, 2; F, 3; F, 4; H, 5; H, 6; H, 16.)

The manner of their payments show them within the principle of a duty, although they did not have that name attached to their origin, like the payments of knight service.—(I, 1; 5 M & S, 166.)

Tithes are collateral to the land (A). Other ecclesiastical revenues were oblations due by custom or canon at a certain time, pensions and mortuaries.

Extra parochial tithes were due to the king (C, 3). All persons generally ought to pay their tithes to whom they are due, and therefore, of common right, all lands ought to pay tithes (D) (11 Co., 15, a,) and the occupier of the lands shall pay them.—(Id.) Some lands were exempt by prescription.—(Ibid., E, 5.) Some lands were discharged by payment of a commutation called a Modus decimandi, or recompense in discharge.—(Ibid., E, 10.)

From this it is apparent that as some were discharged altogether, and others paid a modus in lieu of the regular tax, it was far from uniform throughout England.

Lands held in ancient demesne had certain privileges which commenced by act of parliament.—(Comyn's Dig., title Ancient Demesne, A; per Holt, 1 Sal., 57.) And they shall be free from the expenses of knights in parliament, (F, 2.) Also, from taxes and talliages granted by parliament, if they are not specially charged, (F, 3.) So from toll, passage, and other duties for buying and selling in fairs or markets throughout all England.—(F, 4.) This exemption of a privileged class was substantially overthrown at the revolution and the land tax was laid uniformly throughout England.—(See statute post.)

TALLIAGES and AIDS appear to have been synonymous; not to be taken unless granted, with the assent of parliament, for the common profit of the whole realm.—(Comyn's Dig., PARLIAMENT, H, 910.) This title (H, 11) treats of customs, and also (H, 12) of tonnage and pound-

age, which were also for the safeguard of the sea; so much a ton for some goods and so much a pound for more valuable commodities.

(H, 13.)—A subsidy was an aid granted by parliament upon lands or goods, as for example, by one statute, 4*s.* by the pound upon land, and 2*s.* 8*d.* upon goods, and double upon the goods of aliens.

The fifteenth is also an aid granted by parliament; and it was at first *quinto-decima pars bonorum Mobilium.* By a commission it was ascertained in every town in England, and afterwards recorded in the Exchequer.

The manner of taxation by subsidy was by two taxers, who, being authorized by commission, chose a clerk to act with them, and these swore four or six in each county to make an assessment, which was returned by indenture.—(Id., Forst, 34. See also H, 14; H 15; H, 16; H, 17.)

Title PREROGATIVE (A.)—"The king's prerogative extends to all the liberties, privileges, powers, and royalties allowed by the law to the crown of England;" * * "*for the king has not any prerogative but such as the law allows.*"

(D, 43.)—"The customs upon merchandise exported and imported are the ancient inheritance of the crown. Both magna custuma and parva custuma and prisage; other customs were repealed by act of parliament."—(Id., D, 43; D, 44; D, 45; D, 46.)

The king, by his prerogative, was entitled to have aids pur faire son fitz chivaler, or son eigne fil marier.—(Id., D, 40.)

And anciently a fine was paid to have right and justice.—(Mad., 293; Id., D, 51:) So there was an ancient revenue to the crown to have a fine for a grant of liberties.—(D, 53; Mad., 272, 588.)

Statute 9, Hen. 3, *Magna Carta*, c. 10, A. D. 1224.—(1 Tomlin's Stat., p. 7.) "No man shall be distrained to do more service for a knight's fee nor for any other freehold than therefor is due."

Statute 18 Edw. 1., cap. 1, A. D. 1289, (p. 235.) *Title.* "Purchasers shall hold of the chief lord, and not of the feoffor." * * * "From henceforth it shall be lawful to every freeman to sell at his own pleasure his lands or tenements or part thereof: so, nevertheless, that the feoffee shall hold the same lands or tenements of the same chief lord of the fee and by the same services and customs as his feoffor held them before."

Cap. 2. "And if he sell any part of such his lands or tenements to any, the feofee shall hold that immediately of the chief lord and shall be forthwith *charged with so much service as pertaineth or ought to pertain to said chief lord for such part according to the quantity of the land or tenements so sold.*"

This is an early act taxing land into whose ever hands it comes, uniformly.

Statute 25, Edw. 1, cap. 5, A. D. 1297. Aids, tasks, and prises by this statute appear to be public revenues for the support of wars and state.

Cap. 6. The king will take none but by the consent of the realm and for the common profit thereof, "saving the ancient aids and prises due and accustomed. These latter revenues were "renders of duty."

Cap. 7. Releases an excessive tax—stigmatized as a *male toll.*—(See also 34 Edw. 1, St. 4, c. 3.)

34 Edw. 1, St. 4, cap. 1, A. D. 1306, (p. 301.) Entitled "*De Tullagio non Concedendo.*" "No talliage or aid shall be imposed or levied by us or our heirs in our realm without the assent," etc. This is quoted to show the derivation of the word impost. Lord Coke says that the word tallagium was from the French tallier; to cut out: which is synonymous with excise, and as both were imposed both are included in the word impost.

Statute 17 Edw. 2, St. 3, (A. D. 1323.) "Modus faciendi homagium et fidelitatem." This statute required the freeman, when he should do homage, to swear to his lord in chief—"I become your man * * and shall bear you faith for the tenements that I hold of you saving the faith that I owe unto our lord the king." But he could hold other lands of other lords and his oath of homage to them saved the faith he owed to the king and to his other lords. In all cases "when he shall do fealty to his lord" he added an oath lawfully to do the customs and services which he ought to do, *for the tenements.*

14 Edw. 3, St. 1, c. 20, A. D. 1340, (p. 503.) To raise a revenue for war imposes an uniform tax on the produce of the lands of one-ninth and on all the goods in cities and boroughs. Merchants and persons dwelling in forests and wastes being taxed one-fifteenth.

14 Edw. 3, St. 2, (p. 507,) assures us that not only was this special aid a public revenue but all the revenues

of the Crown from the realm of England were to be spent for the safeguard of the said realm of England.

15 Edw. 3, St. 2, (A. D. 1341,) p. 525, levies of wool uniformly one-ninth by weight.

25 Edw. 3, St. 5, Cap. 11, (A. D. 1352,) p. 585. "Also it is accorded and assented that reasonable aid to make the king's eldest son knight and to marry his eldest daughter shall be demanded and levied after the form of the statute thereof made, and not in other manner; that is to say, of every knight's fee holden of the king without mean twenty shillings and no more, and of every twenty pounds of land holden of the king without mean in socage twenty shillings and no more."

If before this statute there has been any doubt as to the rule by which uniformity was to be fixed it is dispelled. The tax on land is uniform, according to the value of the land; and this, as the basis of uniformity, continued, as we shall see, to the last statute we shall examine.

45 Edw. 3, Cap. 11, A. D. 1371, (p. 719,) nullifies impositions by royal authority, and fixes the English constitution.

5 Ric. 2, St. 2, c. 3. (2 Tomlin's St., 57.)

12 Ric. 2, c. 12. "Also, in respect to the levying of the expenses of the knights coming to the parliaments for the commons of the counties, it is accorded and assented that the said levy be made as it hath been used before this time, adding thereto that if any lord or other man, spiritual or temporal, hath purchased any lands or tenements or other possessions that were wont to be contributory to such expenses before the time of the said purchase, that the said lands, tenements, and possessions, and the tenants of the same, shall be contributory to the said expenses as the said lands, tenements, and possessions were wont to do before the time of the same purchase."

Again we find this land tax attached to the land. The land was wont to pay, and it shall still pay, by the same rule of uniformity, without any reference to who is its owner; yet it appears that, in fact, "the tenants are contributory," and may be distrained to pay.

5 Henry 4, c. 11, (A. D. 1403,) p. 260. The lands of aliens must pay the tithes to the church, though seized into the king's hands.

9 Hen. 4, c. 6, (A. D. 1407,) p. 289. "All foreigners having *lands*, *tenements*, beasts, goods, or chattels within

any towns at the day of the grant of any tenth, fifteenth, or other tax, * * shall be contributory with the inhabitants of such towns."

The impost is one-tenth or fifteenth upon the value of the lands or goods, but the owner is thus indirectly reached and made contributory.

From this time statutes levying land taxes are more numerous, but, as they are not found in most editions of the statutes, I will refer only to those of the more prominent nature to fix the principles under which all were levied.

Statute, 43 Eliz., c. 2, A. D. 1601; (4 Raithby, Stat., 547; 7 Pick. Stat., 30.) Entitled "An act for the relief of the poor," was still in force as late as 1800, and formed the basis of many subsequent statutes for land taxes for particular purposes. § 1. It provides for raising the needed material "by taxation of every inhabitant, parson, vicar, and other, and every occupier of lands, houses, tithes, etc;" and (§ 4) for collection of the tax by distress of goods, and in default, by imprisonment of the body; (§ 6) for an appeal to the sessions by persons dissatisfied with the assessment. § 8. The power is conferred on the authorities of towns and cities. §§ 12, 14. The tax is to be ratably assessed within each parish and upon the parishes, etc.—(See whole act as to details.)

One feature in section 14 is of marked significance. The treasurers were to be elected of those "which were sessed and taxed at five-pounds lands, or ten-pounds goods at the least, at the tax of subsidy next before the time of said election to be made;" that is, the yearly value of the lands, as assessed, was 5*l*. And it makes clear the proposition that the universal rule of taxation of property in 1601 was by valuation, and the gauge of uniformity was value, and no other method was thought of, unless for some special levy like that of "hearth-money."—(13 and 14 Car. 2, c. 10; 8 Pick. Stat., 72.) Attention is called to §§ 1, 6, 7, 8, 9, 16, 17, 18, 21, 22, in which this tax on land is denominated a duty or charge, the latter word being occasionally exchanged for the word impost.

2 W. and M., c. 8; (9 Pick. Stat., 100.) A statute for paving and cleansing streets, etc., provides for the raising "*from the inhabitants*" moneys necessary for the purposes of cleansing the streets according to the usages of the city, "and *all new messuages*, etc., shall be likewise rated

taxed and assessed, and shall pay *proportionable with others.*"—(§ 9.) By §§ 10, 12, 13, the inhabitants may make a pound rate, not to exceed "the rate of four pence in the pound, of the yearly value of any lands, houses, tenements, and hereditaments so assessed, nor the rate of eight pence for every twenty pounds in personal estate."

In this act the rule of uniformity is, in some cases, found by the frontage; but whatever burden is laid upon the land is required of the owner, and, whether much or little, is exacted of him by distress of goods, or imprisonment of body; and this imprisonment is because the payment is his duty on account of his ownership or occupancy. It is a tax of persons in respect of their property by means of an impost, charge, or rate laid upon the property.

In passing it is to be noted that the word duty is also used as synonymous with excise in a vast number of statutes. Two examples are sufficient: 2 W. & M., c. 10, (9 Pick. Stat., 115;) and 2 W. & M., c. 3, the latter entitled "An act for doubling the duty of excise upon beer, etc."

Statute 3 and 4 W. & M., c. 12, § 13, (9 Pick. St., 151,) provides for raising money for materials for improvement of highways, by an equal *rate* upon the inhabitants in the same method as provided in St. 43 Eliz., c. 2, cited ante as to poor rates. But read especially §§ 17, 18. Read also (9 Pick. St., 373) 6 and 7 W. & M., c. 18, preamble and § 14, as to the alternative use of the words;—impositions,—rates,—and duties.

One more statute will suffice for our present quotations. 4 W. and M., c. 1, A D. 1692. "An act for granting to their majesties an aid of four shillings in the pound for one year for carrying on a vigorous war against France." (We need to quote no more, because we have learned by Tomlin's Authority that this statute formed the basis and principle of the land tax for more than a century, viz, to 1798.) The sections of this statute marked for examination are numbered 1, 2, 3, 4, 5, 6, (8, to ascertain the yearly value of lands, etc.); (9, rates accordingly); (10, "execution, that all estates herein charged may equally pay the rates and assessments"); 13, (the money comes indirectly from the owner); 29, (when the proprietor can-

not be found, still the money shall be made of his property, by sale of the land if necessary.)

§§23 and 2. We reserve these sections to the last for the purpose of speaking more at large of the evils they were intended to remedy. "Of every person, spiritual and temporal, of what estate or degree soever," the rates and assessments were to be received. All were to be taxed in respect of their property. All to pay in proportion to their ability; and no locality or individual was to be exempt, any law, statute, custom, or prescription to the contrary notwithstanding. From the year 1224 London and the Cinque Ports had been free from burdens which others of the nation had borne.—(9 Hen. 3, c. 9; 1 Hen. 8, c. 5, §6.) And special privileges had existed by Ancient Demesne, (9 Hen. 3, c. 37; 9 Hen. 4, c. 5,) and by the authorities found in Comyn's Digest and other references made in the earlier part of this argument, it is apparent that a large proportion of those most able had escaped the weight of the burdens the nation had borne. This statute, passed in 1692, in a time of reform, was a fit supplement to the revolution of 1688, and the statute 2 W. and M., c. 2, (9 Pick. St., 60,) which forms the basis and inspiration of our own declaration of independence and constitution of government to secure liberty; this statute of uniform burden according to ability, establishes justice and follows aptly on that securing liberty.

Nor was this a new idea, for the court will observe that every former statute extending universal burden was coupled with or came immediately after re-affirmance of liberty in the confirmation of Magna Charta. Both were too apt to be violated by an aristocratic government; established upon the idea that all were born unequal; and that kings were rulers by divine right and by inheritance. For examples see St. 1, Ric. 3, c. 2; (2 Tomlin's Stat., 693,) which recognizes an inequality so great as to reduce many worshipful men to great necessity, compelling them to break up their households and live in great penury and wretchedness, their debts unpaid, etc. The case of impositions, 2 Cobbett State Trials, 371. More concisely examined in its constitutional bearing by Hallam in his Constitutional History of England. The case of Sir D. Fowlis in 1633, 3 Cobbett's St. Trials, 586, and Rex v. John Hampden, the case of ship-money.—Id., 844.

This rule of uniformity, its origin and the general prin-

ciples of taxation on account of property seem to have come down from Saxon times and to have formed the general and well understood basis of taxation in England. This appears clearly in 1 *Maddox History of the Exchequer*, 208, 272, 569–786, in which attention is directed to *aids*.—569 et seq. 576; 606 (origin of subsidy); 612 (Fines or Commutations); 619 (Scutage or Escuage); 685 (Danegeld; the words, *–firma, superhidagio,—in wasto*, fixing the character of the levy: see especially p. 693); 694 (Tallage); 764 (Customs.) Please read also CALLIS on Sewers, (top pages,) 152, 153, 162 et seq., and 183.)

That this system was well known and understood by Franklin and many others of "the people of the United States," who had lived in England, is very evident. We have no declarations of their construction, and can have none. The speeches made in the Convention or Committee that drafted the instrument are of no value to ascertain their intent, because not one Elector in three in those days of no newspapers knew anything beyond the views of the delegate from his vicinity who would remember his own opinions and give little circulation to those of others. To the words used we must look, coupled with the history of the land from whence most of our institutions gained their rise, and especially in the conclusions of the wisdom of that people in providing guaranties to secure liberty and establish justice, we must seek the true construction.

The case of Hylton vs. The United States (2 Dallas) makes one thing clear, and but one, and that is that the judges were endeavoring to theorize and theorize only. Not a single authority is cited and no reference to the rules of common law can be found.

It seems to me that, upon page 173, Mr. Justice Chase simply misapprehended the words and the object of their use. It was because all possible taxes were included in the words direct taxes, duties, imposts, and excises that these words were used. These were universal words comprehending every phase in which the sovereign could take from the subject to support the state; and these general and generic words were used precisely as they had been in the law,—interchangeably,—and all were used that no wild or vagrant power might be claimed by quibbles and specious arguments upon some new name

or on some old one; like that of Custom, which it might be argued had never been within the denomination of tax or duty. That this Justice was only guessing is evident from what he says, on page 174, as to the distinction between direct and indirect taxes, on which he had no definite ideas but only a general belief.

Yet the principle was right that no tax can be direct but one that can be laid in proportion to the census; and it would be strange indeed, if, as to land taxes, the rule of uniformity and ability to pay had been overturned without the least apparent cause and an experiment substituted. A rule which had its origin in Saxon times; had been adopted successively by Danes and Normans; corresponded with the equality of feudal tenures; had been preserved or revived in the charters of common law liberty and justice; had been perfected by the wisdom of centuries; had been improved and made universal as part of Britain's new and free Constitution after the revolution, forming the unchanged basis of taxation for more than an hundred years, and still the unchanged principle; a taxation in which we had vainly sought to be represented and to participate. It would be strange indeed had all this been overthrown for an experiment; and we have no evidence that the people intended to change it any more than to change the established principles of jury trial and substitute theories. All the reasoning that defines a jury under our Constitution also defines uniform taxation.

Mr. Justice Patterson, on page 176, shows cleary that he was only guessing; confesses that he had no precise ideas, and conjectures that "perhaps" there may be indirect taxes not included within the divisions with whose names he is familiar, and these mythical existences he puts down as a third class. Had the Congress imposed a tax of the tenth sheep or the tenth lamb, and the tenth of all salaries, the court would probably have looked into a book to see what a tax was, if they had any books to look into, and then we should have had more than mere guesses. Had the books been studied they would have seen that the rule of uniformity forbade taxation by the acre, as suggested on page 177, except in the single instance of the sewers, where lands liable to be overflowed were benefited by protection in proportion to their area, and even then the area was not conclusive, but the bene-

fit was to be considered also. I except the scavenger rates by the frontage, as they come rather under the police regulation.

Mr. Justice Patterson comes very near the rule, without discovering it, however, on page 178. "Numbers "do not afford a just estimate or rule of wealth. It is "indeed a very uncertain and incompetent sign of opu- "lence." He thus affirms that the people ought to have required that burdens should be proportioned to ability, without understanding that that was precisely what they did.

At pages 178 and 179 he says that no common principle can be deduced from the practice of the states. I think that even at that time, he was mistaken. It is certain that from the year 1800 to the present the common principle of taxation of lands by valuation has pervaded the system, reaching substantially the same result as the common law; and, more than that, the tax has been required of the owner, in the same way, by distress of goods, imprisonment of the body, and extent upon the lands and sale thereof. And the operation of this rule has been so complete that, without any provision of any state constitution to that effect, the sales of lands for taxes have uniformly been held void if they were not taxed in the name of the right owner, or in no name, under the rule of the common law, (stated ante,) "*for some person ought to be assessed for such lands.*" I believe that this rule has not been relaxed in any state except by special statute for that purpose.

This common law system has attained all that this justice desired, when he said (p. 179), "Let us, however, "hope that a system of land (or property) taxation may "be so corrected and matured by practice as to become "easy and equal in its operation and productive and ben- "eficial in its effects."

It is singular to see how near this judge came to being right (p. 180): "Indirect taxes are circuitous modes of reaching the revenue of individuals." Nothing is more true. Chicago has every year indirectly put her hand into the pocket of George Smith, the Scotch banker, in London, and U. S. Grant, in the White House, by laying taxes on their lands—lands that have never had a turf turned by man since the Indians used them for their camping grounds. Ownerships have changed, titles have

been transmitted, and estates carved out of these titles. Titles would be sold, divested, and transferred by the State of Illinois sufficient to obtain her revenues, if not redeemed by payments of the owner; but, during all, the land is inert, unchanged, and unchangeable by any such influence. The ownership only is affected, and men all over the world are indirectly reached and made poorer—made contributory to the expenses of the government of the city and state.

What is said about a tax on expense is a simple absurdity. Tax a spendthrift on a fortune spent! Tax a man on what he has lost! Get sugar from a maple in June! The tax is laid on the property a man has and not on that he has not.

One book is cited in all this case, *Smith's Wealth of Nations*, and that quotation shows the author of this absurdity, who bases it upon a greater one, whereby he would exempt the miser from the support of the state, no matter how great his ability or possessions nor how much it might cost the state to preserve his property and his ownership, while the liberal man, the man of large family, of large expenses, burdens, and obligations was for that very cause to have another load laid upon him. Justice Iredell says that a tax on land can be laid by a rule of apportionment like a poll tax. There were large land owners at that day; proportionally large as compared with others, and citation of present instances only differs in degree, not in principle. How are you to apportion a tax by the census where landed estates grade down from William B. Astor's forty millions to the colored owner of the swamp lot on the edge of the Potomac or the laborer whose shanty and prairie acre are scarcely worth five dollars. If practical application is a rule of any value, the framers of the Constitution did not intend to change the principles of the common law, for land cannot be taxed by apportionment without shocking all ideas of decency, to say nothing of justice.

Some early Congresses passed laws upon this basis, and that proves that they followed the Supreme Court and fell into the same blunder, and that is all.

To show how little value can be placed on the acts of legislatures as affording contemporaneous construction, I will cite Illinois as the most recent instance.

A Constitutional Convention of considerable ability

spent four or five months in the early part of 1870 drafting a Constitution. For careful study and comprehension of many of the principles expressed it was a remarkable body. The people enacted the draft and it took effect August 8, 1870. The first legislature chosen with a view to carry its provisions into wise and complete effect, contained at least one-third of that Constitutional Convention, and some of the best lawyers of Illinois, including Judge Underwood, J. N. Jewett, Mr. Nelson, etc. Yet of the acts they passed in a four months session, I believe two-thirds were vetoed and returned for unconstitutionality, and a special session had to be called to consider, among other things, seventeen bills that were vetoed after the close of the session, and some of those that received the Governor's signature are void.

Again: Writers of the time could be of little value in the construction; this is to give the garrulous theorist an advantage over the deep and silent Franklin, (whose handiwork is evident in this financial arrangement,) and over others whose brains are more efficient than their tongues. If all had expressed their sentiments we might examine the opinions of two millions of people seriatim, and guess at the united intention; yet they all have spoken, and have made a law, and it is logical that whatever the talk may have been before or afterwards we should seek their intentions in the instrument, which they have used as their embodiment, interpreted as a law by the precedents and rules of law. And the very first rule of construction, if the words are at all ambiguous, is to learn what was the common law before, and what evils it was designed to remedy. (I say this because I had at least an hundred memorandums from contemporaneous writers indicating their ideas as I have given them, but this was before I understood the common law, and now that they are burned I do not deem them worth the time necessary to restore them.)

There is one principle that I think is sometimes overlooked in construing constitutions, and that is that the intention of the law makers is to govern, and inasmuch as this nation is fundamentally democratic, and constitutions are made by the democratic mass of the people, who are incapable of fine ~~show~~ and abstruse theories, such laws are to be construed according to their plain, obvious, common sense meaning. The great power of

the people; the great power of the common law in all the past; the great strength of our institutions based on their authority only, is in their sturdy, honest, common sense.

Taxation as a science fills a large division in the science of government. Mere theory is not worth a copper; practical efficient executive ability is necessary,—financial ability; results must be obtained. And this is precisely the occupation of all the people, making a revenue, accomplishing results;—food, clothing, shelter, necessaries, and luxuries they must have, and to the inexperienced and mere theorist this problem is a difficult one and for a time is filled with impossibilities, but the rule that curbs them is not a paper constitution to be warped by construction or construed away; immutable laws of nature bar the paths they must not tread; but the impossibilities are accomplished and the problem solved. In this kind of knowledge lawyers are very deficient; indeed, as a class, they seem to rank with other stipendaries who do so much work for so much pay. Under these circumstances it is not strange that these questions should not have been raised; the argument from that is a weak one at best, but in this case peculiarly so. This argument is an old one; among the many instances of its application was to Galileo, when he said the world moved; the wise men shook their heads, said he never had been much of a man, many other wise men had lived before him, and if the world moved they would have discovered it. All true, but the conclusion. I have tested this thing from salt water to the Missouri. In scores of cases asking the distinction between direct and indirect taxes, and receiving substantially the same reply as from a farmer of Ohio the other day: "A direct tax is a poll tax, hits a man "straight where he is; an indirect tax is a land tax or a "cattle tax, reaches him anywhere and makes him pay "it to keep his property from being sold."

In conclusion:—Discrepancies and verbal differences between this brief and that of Mason vs. Rollins, written over eighteen months since, will be discovered, yet the differences are not deep and the principles are fully affirmed.—(See brief in that case, section 118, and specially page 509.) It is quite natural that in two years of study something could be improved, and I have been compelled to long and patient study and careful thought to

reach correct conclusions. The law department of my city and county had carried so high a hand as to refuse even inspection of the Warrants of Collection, and denied the power of the courts to compel them to produce evidence, and the courts of original jurisdiction sustained them. Clients seemed to multiply at this juncture. It was evident there could be no middle ground; their principles must prevail or be crushed.

Every oppression by color of justice or right is extortion.—(Co. Litt., 368, *b.*) And this was a great offence by the common law.—(Comyn's Digest, "*Extortion*," (A, 1.)

If this tax is not due it ought not to be taken. Capital is capital; by a little start in life a man can often succeed, but take away his capital and his business is destroyed; he has no resource but to labor with his hands, and he should be protected from such unlawful acts of violence. He ought to have some remedy, some protection. The law is that he shall not be *deprived* of *life*, *liberty*, or property but by *due* course of law, and it is as old as Bracton that "it would be surperfluous to make laws unless those laws were made to be enforced." Is this law a mere superfluity?

Edward Roby,
Counsel.

Note.—The following is quoted not as belonging to this argument, but to the general cases, and because it ought to be read, for it were a shame if a high degree of civilization were not consistent with the practice of as high a degree of justice and of liberty as in theory existed in the dark ages. In *Horne's Mirror of the Justices*, written in the time of Edward I., read: (page 4.) "And, although the king ought not to have any peer in the land, nevertheless because that the king, of his own wrong, if he offend against any of his people, nor none of his commissaries, can be judge and party, it was behoveful by the law that he should have companions to hear and determine of all writs and plaints, of all wrongs, as well of the king as of the queen and her children, and of those especially where one could not have otherwise common right." Page 8: "It was ordained that everyone have a

remedial writ from the king's chancery, according to his plaint, without difficulty."

Page 10: "It was ordained that the king's courts should be open to all plaints, by which they had original writs, without delay, as well against the king or the queen as against any other of the people."

Page 20: "Into perjury against the king fall those ministers who deny to plaintiffs original writs possessory, attaints or of formedon, or otherwise do delay their rights, and those who wrongfully do delay or disturb rightful judgments, and those who wrongfully favor wrongful judgments."

Page 51: "The sheriffs, by ancient ordinances, hold several meetings twice in the year in every hundred when all the freeholders within the hundred are bound to appear for the service of their fees. * * Such appearances are called sheriffs' turns, where it belongeth to the sheriff to inquire of all personal offences, and of all their circumstances, done within those hundreds, and of all wrongs done by the king and queen's officers, and of wrongs done to the king and to the common people, according to the points aforesaid in the division of offences."

Page 52: "Views of the frank pledges." "It was also ordained that every hundred do make a common meeting once in the year * * to inquire of the points aforesaid and of the articles following. * * The articles are these:

By the oaths you have taken you shall declare * *

Of all wrongs done by the king's officers and others to the common people.

* * * * * * *

Of every wrongful detinue of the body of a man or other distress.

* * * * * * *

And the said presentments are to be sealed with the seal of the jurors, so that none by fraud do increase or diminish them."

And for every matter there is to be its proper redress. This is the original of charges to grand juries.

Page 62: "Therefore the kings used to go from county to county every seven years to inquire of offences and trespasses, and of wrongs done to themselves and to the

crown and to the common people, and of all wrongs, errors, and negligences of their officers."

Page 177: "Jurisdiction is a power to declare the law." A true definition to-day, for, as Lord Coke says, "*Ex facto jus oritur.*" *Ergo;* a state cannot have jurisdiction of the subject-matter of these suits.

It is believed by many learned men that this book was written by King Edward I. himself. If so the section upon the "abusions of the common law" is of great significance, as he has sometimes been compared with Justinian as the founder and compiler of the system of laws.

Page 225: "It followeth that many ordinances are grounded more upon pleasure than upon law."

Page 236: "It is an abuse that we do not sue for a tortious distress by way of felony, and that one attaint not these robbers at the king's suit."

Page 238: "It is an abuse that justices and their officers, who kill people by false judgment, be not destroyed as other murderers, which King Alfred caused to be done."—(p. 241.) "He hanged Hall because he saved Tristram the sheriff from death; who took to the king's use, from another's goods, against his will, for as much as any such taking from another against his will and robbery hath no difference."

"He hanged Arnold because he saved Boyliffe, who robbed the people by color of distresses, whereof some were by selling distresses, some by extortion of fines, as if betwixt extortion of fines releasing of tortious distresses, and robbery there were difference."—(p. 245.) "In his time every plaintiff might have a commission and a writ to his sheriff, to the lord of the fee, or to certain justices assigned, upon every wrong which was done."

See the antiquity of the common law princeple, "for every wrong a remedy."

Page 262: "And it seems cross to make constitutions not holden."

Page 278: "The statute of distresses made by bailiffs unknown is distinguishable, for in tortious distresses without warrant the judgment of robbery holdeth."

In the pamphlet annexed to this edition of *the Mirror*, compiled Ann. 21, Henry VIII., on *The Diversity of Courts and their Jurisdictions*, read at page 287: "It is to be un-

derstood that the king is the fountain of justice, and to that purpose ordaineth judges, that justice be administered to all his subjects."

I have read this ancient and valuable book through to-night and the above is the cream of the matter relating to this subject. I shall quote farther from it, however, when treating of the trial by jury guarantied by the Constitution, and of the power of the court over evidence, in the argument which I will file in a few days (in No. 391 of present 1870 term, i. e., 213 kegs Tobacco, etc. v. The U. S.) against the power to punish violations of law by a suit *in rem* for forfeiture.

Edward Roby, Counsel.

In the Supreme Court of the United States.

LEMUEL W. MASON, *Appellant*,
vs.
E. A. ROLLINS, Commissioner of Internal Revenue,
W. B. ALLEN, Collector, and
DUNCAN FERGUSON, Assessor,
Appellees.
No. 273.

PARKER R. MASON, *Appellant*,
vs.
C. DELANO, Commissioner of Internal Revenue,
W. B. ALLEN, Collector,
DUNCAN FERGUSON, Assessor,
and
S. S. MANN, Deputy Collector,
Appellees.
No. 274.

PARKER R. MASON, *Appellant*,
vs.
C. DELANO, Commissioner of Internal Revenue,
EDWARD JUSSEN, Collector,
J. D. WEBSTER, Assessor, and
P. W. HART, Deputy Collector.
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Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR THE UNITED STATES.

The bill in the first of these cases describes the complainant and defendant, Allen and Ferguson, as citizens of the State of Illinois.

The other defendant, Rollins, is said to be "of Washington, in the District of Columbia, and a citizen of the State of———, Commissioner of Internal Revenue."

In the second case the bill describes the complainant and the defendants, Mann, Allen and Ferguson, as citizens of the State of Illinois.

The other defendant, Columbus Delano, is described as Commissioner of Internal Revenue, and no citizenship assigned him.

In the last case the complainant is described as a citizen of Illinois, and the defendants are named in their respective official characters. Nothing is said as to their citizenship.

Neither of these bills, then, contain sufficient allegations to give the Circuit Court of the United States jurisdiction, under the Judiciary Act of 1789.

The 50th Section, of the act of June 30, 1864, (13 Stats., 241) which extended the provisions of the act of 1833, (4 Stats., 632,) to cases arising under the laws for the collection of internal duties, &c., was expressly repealed by the 68th Section of the act of July 13, 1866, (14 Stats., 172,) and it was further provided in the latter act, that the act of 1833 should not be so construed as to apply to cases arising under the Internal Revenue act of 1864, or any amendatory acts; nor to any case in which the validity or interpretation of such act, or acts, shall be in issue.

The precise point has been passed upon by this court, in Insurance Company vs. Ritchie, (5 Wall., 541.)

There has been no change in the law, in this respect, since the opinion of this court in that case. The Circuit Court having no jurisdiction of these cases, the bills were properly dismissed.

B. H. BRISTOW,
Solicitor General.

UNITED STATES OF AMERICA:

SUPREME COURT.

LEMUEL W. MASON, Appellant,

v.

EDW'D A. ROLLINS, Comm'r, DUNCAN FERGUSON, Assessor and
WM. B. ALLEN, Collector, COLUMBUS DELANO,
Commissioner of Internal Revenue.

Appeal from Seventh Circuit, Northern District of Illinois.

ARGUMENT FOR APPELLANT.

EDWARD ROBY, Counsel.

CHICAGO:
BEACH & BARNARD'S PRINT, 126 S. CLARK STREET.
1870.

INTRODUCTION.

This was a Bill in Chancery filed in the Circuit Court in the Northern District of Illinois.

The parties to the suit are a Rectifier, as plaintiff, a Collector, Assessor, Commissioner of the Internal Revenue, and his successor, as defendants.

All of the parties except the Commissioners are citizens of Illinois.

The subject matter consists of;

1st. Certain irreparable injuries, commenced and threatened by defendants in executing the statute entitled, "an "Act imposing taxes on Distilled Spirits, Tobacco, and "for other purposes;" passed July 20, 1868.

Upon which the relief prayed is:

(1.) An injunction against the officers, their confederates and successors.

(2.) That the statute may be declared null.

2d. A right to pay a special tax as rectifier; upon which the relief prayed is, a mandamus, to compel the Assessor to assess and Collector to receive the special tax, and issue the usual license.

To the Bill as filed in November, 1868, the defendants interposed a demurrer for want of equity; which was sustained, and an opinion delivered, which is hereinafter inserted: In which the point was presented, that the defen-

dants had only threatened to execute the statute and regulations of the Commissioner; but had not done anything more than accept office and threaten.

Leave being granted to amend; the amendments presented actual seizure and control.

And a supplemental Bill showed that plaintiff had applied to the Assessor to assess, and Collector to receive the special tax, and been refused.

To these Bills the defendants demurred for want of equity. The demurrer was sustained and Bills dismissed, and the plaintiff appealed to this court.

The grievances are concisely, yet fully set forth in the stating part of the Bills, which appear in the *Appendix* to this argument.

They are briefly that plaintiff's Rectifying house which he had rented at $5,000 per year from the owner of the adjacent distillery, stood, at the passage of the Act, but 200 feet from the distillery, whose lessee had obtained a license. The Act, and its threatened execution, destroy the value of the property, and deprive the plaintiff of the right to use his time and capital as he pleases, which is part of his public liberty. In executing the Act, the officers have dismantled and control his property. His damages are,

1st. The rent, $5,000 per year.

2d. The profits of the business, which cannot be estimated.

3d. His bankruptcy from liability to the heavy rent and destruction of his business and income.

4th. The loss of his liberty, which cannot be measured.

5th. The daily repeated tresspasses of the defendants under color of their offices.

These, and other irreparable injuries, are specifically set forth in the Bill.

The suit is by a citizen, claiming protection of the Constitution against officers of the United States, who claim to act solely under the authority of the laws, and in the name of the United States.

It is, therefore, a suit arising solely under the Constitution and laws of the United States.

The questions presented are,

1st. Had the Circuit Court jurisdiction to hear the case at all?

And if it had, had it power to issue the injunction and the mandamus?

2d. Do the pleadings present a case for the exercise of that jurisdiction?

And if they do, and the court has power to issue the injunction and mandamus, are those the proper remedies?

These divisions I will consider in their order, taking up the cumulative questions, in the discussion of each.

CHAPTER I.

Had the Circuit Court jurisdiction to hear the cause at all? And if it had, had it power to issue the Injunction and the Mandamus?

SECTION I.

The logical position of this head, *in limine*, closes the bills till we know whether or not the court can hear the complaint. The nature of the complaint, only, can be considered.

We must assume that the plaintiff has certain plain and undeniable legal rights, and that those rights have been violated. And decide whether the Circuit Court had jurisdiction and power to afford him a remedy;—the case arising, solely, under the Constitution and laws of the United States.

In the argument I will cite the authorities *which have decided* that this Court has inherent in it, jurisdiction and power to grant this remedy which nothing but the power that made and can alter the Constitution, can take away, *some of them clear and to the point—direct decisions*—and others in which the doctrine may be called *obiter dictum.* If it is so denominated even in a portion of the cases cited in support of the authority, then I will lay the line to every case opposed, and by their own language show that they were either mere defaults, or inadvertant expressions

or *dicta*, and that in denying jurisdiction in such cases the Circuit Courts have done contrary *to the settled law*; And will show that the plaintiff's right to this remedy is as clear and as complete in him as the right to hold their offices during good behavior, or receive an undiminished compensation is in the judges of the courts inferior to the supreme court.

Among the cases examined will be that upon which the United States attorney most relies, *Insurance Co.* v. *Ritchie*, 5 Wallace, 541. To understand it, it is necessary to understand the principles of law, which were not raised, considered, decided, or even questioned in that case. I have, therefore, deferred its consideration to section 64 *post*, to which I beg leave to refer.

SECTION II.

For the threatened seizures and tresspasses the only remedy is an Injunction from the Federal Courts.

When, as in this case, the seizure of property, wrongfully, will entail consequential damages, for which the law gives no complete remedy, equity will afford a full and prompt remedy by injunction.

Watson v. *Sutherland*, 5 Wallace, 78.
This is a parallel case.

Where, *as in this case*, money, seized for taxes wrongfully, will be paid over to the State which cannot be sued, equity will prevent the seizure, on the principle that equity will always prevent the transfer of a specific article which, if transferred, will be lost to the owner.

Osborn v. *U. S. Bank*, 9 Wheat., 845.

"It is not enough that there is a remedy at law. It "must be plain and adequate, or, in other words, *as prac-* "*tical and efficient to the ends of justice and its prompt ad-* "*ministration, as the remedy in equity.*"

Boyce's Ex'rs v. *Grundy*, 3 Peters, 210, p. 215.
Payne v. *Hook*, 7 Wallace, 430.
Osborn v. *U. S. Bank*, 9 Wheat., 841, 842, and 845.
Barber v. *Barber*, 21 How., p. 591.
U. S. v. *Howland*, 4 Wheat., 108.

A mandamus never issues where there is another remedy. (*Tapping's Mandamus.*)

Yet, wherever a mandamus will issue, an action on the case will also lie.

By Statute, the United States Courts are forbidden to entertain suits in Equity, where there is a remedy at law.

In *Watson* v. *Sutherland*, 5 Wallace, 74, an injunction was issued, where every dollar of direct injury could be redressed by suit.

A Court of Chancery will not take cognizance of a case, where there is a remedy at law; yet, *Payne* v. *Hook*, 7 Wallace, 430, decides, upon the authority of a series of cases, that remedies in State Courts cannot defeat the jurisdiction of United States Courts.

Philadelphia v. *The Collector*, 5 Wallace, 730, in effect, declares the statute void, which forbids suit against a revenue officer, till after appeal to the Commissioner, and decides that the right of appeal to the Commissioner, or of petition to Congress, or prosecution in the Court of Claims, is no remedy.

The right in this case is stated in the Constitution: "No man shall be deprived of his" * * * "property "but by the judgment of his peers or the law of the land." For this we seek a remedy; and there is but one complete remedy, viz: that which prevents any deprivation. The right to sue for and recover the money from the officers after years of expensive litigation and of exposure to the risk of their insolvency, cannot be as practical and efficient as the remedy in equity, and can never be complete; for, as we have seen, *prevention* is the only remedy co-extensive with the right.

" *The absence of a complete and adequate remedy at law* " *is the only test of equity jurisdiction*, and the application " of this principle to a particular case, must depend on the " character of the case, as disclosed by the pleadings."

Payne v. *Hook*, 7 Wallace, 430.
Watson v. *Sutherland*, 5 Wallace, 78.

The equity jurisdiction of the courts of the United States is not limited or restrained by the local remedies in the different States; it is the same in all the States, and is the same which is exercised in the land of our ancestors from whose jurisprudence our own is derived.,

Rhode Island—*Pratt* v. *Northam*, 5 Mason, p. 105.
Mass.—*U.S.* v. *Howland*, 4 Wheat., p. 115
Tenn.—*Robinson* v. *Campbell*, 3 Wheat. p. 221-2, (leading case.)
Miss.—*Green's Adm'r.* v. *Creighton*, 23 How., 90, and authorities cited, 95.
Mo.—*Payne* v. *Hook*, 7 Wallace, p. 430 (opinion by Davis, J.)
Irvine v. *Marshall*, 20 How., 558.

Therefore, on principle, the fact that the citizen might have a remedy in a State court, cannot affect the remedy in the United States court, and it is so decided.

Barber v. *Barber*, 21 How., 592.

But, he cannot have a remedy in a State court; for judicial control over officers of the United States, as such officers, must of necessity belong to the judicial power of

the United States, and not to the judicial power of the several States; and this is vested in the courts of the United States, and not reserved to the States respectively. The State courts have jurisdiction of the persons of their citizens, as such; but as officers of the United States they are under the control of its government *only*.

McClung v. *Silliman*, 6 Wheat., 598.
For other authorities see post, sec. 50, *et seq.*

The Judicial department is as much a part of the government of a State as the Executive, and can no more control the officers of the United States than the State Executive.

Upon this point our course begins to digress from what may be the commonly received opinion at this bar, and is certainly the opinion of a number of very learned counsel who have brought similar suits in State courts, and of the District Attorney, who has not demurred to their jurisdiction. Their action has caused me to review my own with great care; and while, in view of the principles and precedents which I believe govern the question, I cannot think that they have given the subject a close examination, still their opinions make it my duty to present, for the assistance of the court, a complete resume of those matters, which still compel me to retain my opinion.

The Government of the United States is one of *enumerated powers.*

Gibbons v. *Ogden*, 9 Wheat., 187.
Weister v. *Hade*, 52 Penn. State Reports, 477.

"It can claim no powers which are not granted to it by

" the Constitution ; and the powers actually granted, must " be such as are expressly given, or are given by *neces-* " *sary* implication."

Martin v. *Hunter's Lessees*, 1 Wheat, 326.

But where powers are conferred upon the General Government, the exercise of the same powers by the States is impliedly prohibited wherever the intent of the grant to the National Government might be defeated by such exercise. *Its own operations are exempted from State influence.*

McCulloch v. *Maryland*, 4 Wheat., 316, 427.

Had the Constitution contained but this clause: " The " judicial power of the United States shall be vested in the " courts," it would have been clear that a power was enumerated by the people and delegated to the United States or to some department of the Government thereof, and that that power was not reserved to the States, respectively, or to the people.

The judicial power of the United States must extend to the utmost limits of its government, (*post*, *sec.* 50 *et. seq ;*) for, wherever laws are to be obeyed, there they must be construed and enforced, and the power to construe and enforce by punishing disobedience, is judicial. What subjects its name includes, can only be decided by construction. For it is evident that, inasmuch as the Constitution delegates no power to add anything to the powers therein contained, but expressly reserves all powers, not granted, nothing can be added to the fundamental law.

Legislation makes new laws, or repeals or alters old ones, while judicial power decides what the law is and construes, explains and applies it to the circumstances of each particular case. Therefore it is apparent that the first power necessarily included in the words Judicial Power of

the United States, is the power to decide *to what that power extends.*

As with the matter of acquiring jurisdiction, it cannot be determined, till the conservator of this power has passed upon the question, whether the particular matter or party is within the power.

Ex parte Cabrera, 1 Washington, C. C. Rep., 232.
Ex parte Ferguson, 9 Johnson, 239.
Slocum v. *Mayberry*, 2 Wheat., 1.
Same case, 2 Cranch, 1, p. 9 and 10.
Gelston v. *Hoyt*, 3 Wheat., 246, p. 312.
U. S. v. *Judge Peters*, 5 Cranch, 115.
Freeman v. *Howe*, 24 How., p. 457 et. seq.

It is also evident that the power to construe and enforce all laws of the United States, *and especially the power to construe and administer justice distributive under the fundamental law, is essentially and necessarily included in the judicial power of the United States.*.

In these matters no interruption could be tolerated and no deference paid to any tribunal which was not invested with equal authority over the subject. We need not discuss the propriety or policy of State courts having the power to interfere with the administration of Federal officers or laws for or against them; that was settled by the framers of the Constitution. We have nothing to do with policy, and can only inquire, *What is the law?*

Were the State courts invested with equal authority, over these subjects, necessarily included in the term judicial power of the United States? The answer is clearly negative.

Though the Constitution and laws of the United States, made in pursuance thereof, are the supreme law of the land, and the judges of the several States are bound thereby, yet the judicial departments of the several States are only departments of the governments of those States, and the judicial power of the United States was not reserved to the States. The Constitution and laws are the supreme law, and the judges of the several States are bound thereby—not to administer the judicial power of the United States;—but, as exercising the judicial power of the several States, they must declare the State constitutions and State laws void, whenever they are contrary to this supreme law, and decline to execute them. It would be as proper for any other department of a State government to administer any other of the powers expressly granted to the United States, as for the State courts to exercise those powers necessarily included in the judicial power of the United States and granted to the Government of the United States.

In the cases at bar, the United States is acting through its officers; they are its agents and under its control. If the money is taken, it will be paid over to it.

Cary v. *Curtis*, 3 How. 247, 249.

In this suit, if it could be sued, it would be a proper defendant.

The Bills of Rights contained in State Constitutions, evidently have no authority over it; nor can State statutes or laws control it. To the fundamental law of the United States and to United States statutes, based thereon and authorized thereby, it and its agents are amenable, and to them alone.

We charge them with violation of that fundamental law, and pray that this clause: "no man shall be deprived of

his property" by the Government of the United States, "but by the judgment of his peers or the law of the land," may be enforced against that government and its officers.

(1.) It is clear that no single State has a government competent or commissioned to construe the fundamental laws of the United States and administer justice based solely thereon;

(2.) And further, that, as the equity jurisdiction of the United States' judicial power is not limited or restrained by the local remedies in the different States, it makes no difference what collateral remedies may be had in State courts, nor how partial or how complete they may be.

(*Authorities cited, ante.*)

Article 3, Section 1, as we have seen, enumerated and granted certain powers to the Government of the United States,—and certain powers passed by the grant, however strict or narrow a construction might have been given to the words.

Section 2 grants nothing. It is, in its first division, constructive only, and names many cases and parties which could not have been included in the grant as strictly construed, but which, by a most liberal construction, would still have been held to be within it. And this view is confirmed by the 11th Amendment, which does not purport to withdraw a particle of judicial power, but only affords a rule of construction of the original grant, viz.: that it shall not be construed to extend to the power to coerce a sovereign State at the suit of any private citizen or an alien.

Upon the ground, which would have been debatable had there been no clauses to construe the grant, is the field of concurrent jurisdiction. Here parties and subject matter may, under some circumstances, be within the judicial power of a particular State, and the State government may

then be competent to administer justice; but, even here, both, parties and subject matter, *must* be within the judicial power of the United States; and the United States' Government must always be competent to administer a remedy. Where the particular dividing line may be, does not concern this argument. It arises only where the suit is brought in the State courts; though it is quite clear that the parties to this suit, viz.: the officers of the United States Government, acting as such, are not under the control of the government of this State, nor is the subject matter within the jurisdiction of the judicial power of this State; but the plaintiff as a citizen, and the defendants, as officers, as parties, and the enforcement of the fundamental law of the United States as subject matter, are within the judicial power of the United States.

I do not wish here to anticipate the argument, but only refer to abstract judicial power—that power which is, or could be vested in the courts without any further constitutional enactment.

(3.) This is then a case of a clear and undeniable right.

It is also a case where the only remedy is by injunction from this court.

It is a case "in equity," arising under the laws of the United States.

It is a case where the Constitution is about to be violated, and the only remedy possible for this wrong, is prayed.

(4.) On is a motion to dismiss a bill, which discloses the above facts, on the ground, (1), that they do not constitute a case of which this court can take cognizance, (provided any defendant is a citizen of the same State with the plaintiff,) and (2), because the statute forbids suits to restrain the collection of a tax.

(5.) The first ground is urged upon these premises:

First. Congress created the courts and delegated to the courts, inferior to the Supreme Court, power over all cases at law and in equity, arising between the citizens of different States.

Second. In 1833, Congress delegated to these courts power over all cases arising under the revenue laws of the United States.

Third. In 1866, Congress repealed the Act of 1833 and withdrew the power.

(6.) It is conceded by the United States' Attorney, and is stated in the case on which he relies as authority, (*Insurance Co.* v. *Ritchie*, 5 Wallace, 541,) that this is a case in equity arising under the revenue laws of the United States; and that but for this resumption, in 1866, of the delegated power, by Congress, the court would have had jurisdiction.

(7.) To the argument we reply that the adjudged precedents, as well as sound construction, forbid all three of the premises presented; and all conclusions, based on them, must fall.

The power of the courts was derived from the People, not from Congress,—they delegated, and can alone divest it.

The judicial power of the United States is vested in the one supreme court and the courts inferior thereto, for, so the letter of the Constitution is. Not such judicial powers as Congress may delegate, but—the judicial power of the United States, is vested.

The courts are Common Law Courts of Justice.

The law of the land is the Common Law.

For every right there is a remedy, and for every injury its proper redress by suit or action.

And this is guaranteed to every citizen by the Constitution.

The cob-webs of half argued and ill-considered cases hang before these principles. For some years past, circuit courts have shrunk from meeting the responsibility of this question, and have smothered it. But, as I believe that upon its decision depends the integrity of our Constitution, and the very essence of civil liberty under this government, (see *Marbury* v. *Madison*,) as I believe it is the most important single question ever presented to this court, and as we are now face to face with it,—I feel that its record must be written, and to that end, ask a patient and careful consideration of the principles thought to govern, and the cases thought to have decided them.

The questions are:

1*st*. *Whether, without reference to the Congressinal grant, the courts have power to remedy every wrong, and*

2*d*. *Whether Congress can take away all remedy at law from the citizen?*

SECTION III.

The right is absolute, and the power of the Courts to afford the remedy, is also vested in them absolutely.

If citizens of the United States, as such, have an absolute right to acquire, possess and enjoy property, under the Constitution, it is because this right is inherent, absolute, inalienable.

Grotius, Lib. 1, C. 1, S. 4 et seq.
Rutherforth's Inst. 14, et seq.
1 Bl. Com. 122 to 145.
Declaration of Independence.

Because it is the duty of governments to protect the citizen, and especially because this government was established to secure liberty and justice to the citizen.

Const. Preamble, and Amendments, Art. IX.

At page 138, BLACKSTONE writes:

"The third *absolute* right *inherent* in every Englishman "is that of property, which consists in the *free use, enjoy-* "*ment and disposal* of all his acquisitions *without any con-* "*trol* or diminution, save only the law of the land.

"The original of private property is probably found in "Nature, * * * but, certainly, the modifications un- "der which we at present find it, *the method of conserving* "*it in the present owner* and of translating it from man "to man, are entirely derived from society, *and are some* "*of those civil advantages, in exchange for which, every* "*individual has surrendered a part of his natural liberty.*

" The laws of England are, therefore, in point of honor " and justice, extremely watchful in protecting this right.

" Upon this principle the great Charter has declared " that no free man shall be disseized or divested of his free- " hold, (that is lands or livelihood, 2 Co. Inst. 46,) or of " his liberties, or free customs, but by the judgment of his " peers or by the law of the land. And by a variety of " ancient statutes it is enacted *that no man's lands or goods* " *shall be seized into the King's hands against the Great* " *Charter and the laws of the land*, and that no man shall be " disinherited, or put out of his franchises or freehold *un-* " *less he be duly brought to answer and be forejudged by* " *course of law ;* and if anything be done to the contrary, " *it shall be redressed and holden for none.*" (Lord COKE translates this word, " undone," instead of redressed, 2 Co. Inst. Proele.)

" So great, moreover, is the regard of the law for private " property, that it will not authorize the *least violation of it*, " no, not even for the general good of the whole commu- " nity."

The manner, in which liberty and justice are to be preserved, appears :

1st. " All legislative powers *herein granted*, shall be vested in Congress." (Const. Art. 1, S. 1.)

2d. " The Executive power shall be vested in a President." (Art. 2, S. 1.)

3d. " The Judicial power of the United States shall be vested in one supreme court, and such inferior ocurts as the Congress may, from time to time, ordain and establish." (Art. 3, S. 1.)

"The judicial power shall extend to all cases in law and "equity, arising under this Constitution, the laws of the "United States,' &c. (Art. 3, S. 2.)

The grant of legislative power is limited.

Hayburn's Case, post.
Const. Art. 1, S. 1. Amendment X.

The grant of judicial power is absolute (Art. 3, S. 1 and 3), and extends to *all* cases in equity as well as at law.

The province of equity is well established, viz.: to remedy those things wherein the law, by reason of its universality, is deficient.

Grotius, De Equitate, S. 3.
Plowden, 375.
1 Blk. Com. 62.

To assure a remedy wherever there is a right.

It grew out of Magna Charta ("We will not to any man deny nor put off, either justice or right") and the constitution of Chancery, wherein the Chancellor was directed to find a remedy for every violation of Magna Charta. (Co. Inst.)

How Injunctions grew into use, we do not know; but that they were granted as an exercise of judicial power by all courts of equity, at the date of the Constitution, and that all men, liable to suffer irreparable injury for which they had no remedy at law, had the right to the protection of this power, no one will deny.

This power was a "judicial power in equity," or it was not: if it was not,—nearly all our courts of equity, to day, issue such mandates unwarranted and powerless;—if it was,—it was vested in the courts of the United States, by the Constitution.

As no power is granted to the legislature to divest the judicial department of the judicial power, or any part thereof, that power must remain complete and intact until the People act upon it.

Amendment X.

If Congress can "divest the courts" of the least particle of judicial power, it can divest them of the most essential portions, or destroy it altogether.

As there can be no limit to such legislation, if allowed, at all, it must be stopped at the threshold.

And the courts must jealously and firmly resist any encroachment whatever.

Hayburn's Case, 2 Dallas, 409, and note.
(See especially the preamble to N. Y. Resolutions.)
Du Chastillux v. *Fairchild*, 15 Pa. 18.
State v. *Fleming*, 7 Hump. (Tenn.) 152.
Ervine's Appeal, 16 Penn. 256.
Young v. *The State Bank*, 4 Ind. 301.

SECTION IV.

The Government of the United States is divided into three distinct and independent branches or departments. Only certain enumerated legislative powers are vested in the Congress, but the whole judicial power of the United States has been placed in the Courts.

Hayburn's Case, 2 Dallas, 409, A. D. 1792.

This case arose on a motion for a mandamus, commanding the Circuit Court for the District of Pennsylvania to proceed with the petition of Wm. Hayburn, who had applied to be put on the pension list of the United States as an invalid pensioner. The case, being very important, was held under advisement until the next term. In the meantime Congress repealed the obnoxious law, and no decision was ever given by the whole court.

The Supreme Court was organized and held its first term, February 1790.

JOHN JAY, *Chief Justice.*

WM. CUSHING,
JAMES WILSON,
JOHN BLAIR, } *Justices.*

At August Term, 1790, James Iredell qualified as justice. No other justices were added until after the decisions mentioned below.

The business of the court was light, occupying but nine pages of the report, and being five cases, in which States were parties as plaintiff or defendant.

April 5th, 1792, the Circuit Court for the District of New York, consisting of John Jay, Chief Justice, Cushing, Justice, and Duane, District Judge, proceeded to take into consideration an Act of Congress, entitled: "An Act to "provide for the settlement of claims of widows and or- "phans, barred by the limitations heretofore established, "and to regulate the claims to invalid pensions," and were thereupon unanimously of opinion and agreed, "that, by "the Constitution of the United States, the government "thereof is divided into three distinct and independent "branches, and that it is the duty of each to abstain from "and oppose encroachments on either."

April, 18, 1792, the Circuit Court for the District of Pennsylvania, consisting of Wilson and Blair, Justices, and Peters, District Judge, made the representation to the President: "To you it officially belongs to take care that "the laws of the United States be faithfully executed. "Before you, therefore, we think it our duty to lay the "the sentiments which, on a late, painful occasion governed "us, with regard to an act, passed by the legislature of "the Union."

"The people of the United States have vested in Con- "gress all the *legislative* powers, granted by the Constitu- "tion."

"They have vested in one supreme court, and in such "inferior courts as Congress shall establish, the *judicial* "*power* of the United States."

"It is worthy of remark that, in Congress the *whole* "legislative power of the United States, is not vested. "An important part of that power was exercised by the "people themselves, when they ordained and established "the Constitution."

" This Constitution is the Supreme Law of the land."

" This supreme law all judicial officers of the United " States are bound, by oath or affirmation, to support."

" It is a principle, important to freedom, that in govern- " ment, the judicial should be distinct from and indepen- " dent of the legislative department. To this important " principle the people of the United States, in forming their " Constitution, have manifested their highest regard."

" They have placed *their judicial power, not in Con-* " *gress, but in the courts.*" * * * *

" Congress have lately passed an act to regulate, among " other things, the claims to invalid pensions."

" Upon due consideration, we have been unanimously " of the opinion that, under this act, the Circuit Court, " held for the District of Pennsylvania, could not proceed." * * * *

June 8th, 1792, the Circuit Court for the District of North Carolina, consisting of Iredell, Justice, and Sitgreaves, District Judge, represented to the President that the court would not obey the act, and, among other things, state, " that the extreme importance of the " case requires them to state the principles beyond the pos- " sibility of being misunderstood," and proceed:

" The Legislative, Executive, and Judicial departments, " are each formed in a separate and independent manner, " and the ultimate basis of each is the Constitution, only, " within the limits of which, each department can alone " justify any act of authority."

Thus we see that Judges Jay, Cushing, Wilson, Blair

and Iredell, constituting the entire supreme court, in connection with District Judges Duane, Peters and Sitgreaves, proceeding with the greatest deliberation, yet, jealously and firmly did resist the first encroachment of the Legislature. And Congress endorsed their action, and withdrew from the attempt.

They were cases of principle, a jealous declaration by the "Inferior Courts," that the legislative power was limited by the grant, that an important part of it was exercised by the people in enacting the Constitution, and was reserved to them. But that, as judicial power could never remain inaccessible in a free country,—as justice and right must never be denied, neither delayed nor put off, to any man,—the whole judicial power to remedy every wrong, was vested in one supreme court and such inferior courts as Congress should establish.

The judicial power, extending to this case in equity, is the only power that can remedy this irreparable injury.

An ultimate injunction, forbiding the collection of the tax, is the only remedy that is adequate.

If the courts ever had the power to grant an injunction in such a case, they derived their power from the *legislation of the people.* The people granted to Congress power to establish courts, but themselves legislated on their powers; and, then, not only did not grant any power to Congress to circumscribe the judicial power, but expressly reserved it, and, as our case decides, left the "ulti-" mate basis of the power in the Constitution only."

SECTION V.

We have no remedy at law, and this remedy is guarantied by the Constitution.

We come into equity because we have no remedy at law. If a remedy was provided at law, equity would have no jurisdiction; therefore, if the Congress can take away our remedy, it can nullify Magna Charta and the Constitution, and compel the courts to deny justice and right.

We have no remedy at law, even though the assessor and collector were liable in trespass;—if money is paid to the collector, it will be paid over to the United States, which is above law; and we have then, at best, only an action against the agent, a mere shadow of the remedy for our right to keep our money.

Osborn v. *U. S. Bank*, 9 Wheat., 738.

In this case, Ohio taxed the Bank $50,000 if it should continue to do business within the State; and the auditor issued the warrant, which was levied; and the court held that a right of action against a private individual was but the shadow of a remedy for the transfer of the property of the Bank to the State, which is above law.

The question really is: Can the legislature enact a void statute and set sufficient power to work to execute it, and then, to make its usurpation effectual, deprive the citizen of the protection of the courts? Can it arbitrarily destroy life or liberty, or divest property and, by taking

away the remedy, evade the plain provision: "No man "shall be deprived of life, liberty or property but by the "judgment of his peers or the law of the land?"

Suppose it enacted that any person who shall steal from any member of Congress, may be killed, and any person who shall kill any one whom he shall believe guilty of such theft, shall receive a reward of $1,000, and no criminal prosecution shall be maintained against such homicide. Or, suppose it enacted that any person who shall be suspected of forgery, shall be arrested by the marshal, without warrant, and imprisoned for two years, and no petition for a writ of *habeas corpus*, or for release or trial, shall be entertained by any court, nor shall any court in any manner take cognizance of the imprisonment. Or, suppose it enacted that, if any person shall issue counterfeit money, the marshal shall forthwith seize his property and deliver the same to the United States, and no suit to restrain such seizure shall be maintained in any court.

In all these supposed cases the statute would only take away one remedy; the action of trespass could be maintained against the wrong-doer, and it could not be said to be a right without a remedy. Could not? Let us analyze the matter:

In the first case, the man had the right to life, and, by the law of nature, had the right to the protection of society. Is the remedy for damages, which his dependants would have, any remedy for his right to life and protection?

In the second case, he had a right to liberty. Could any action for damages compensate him for years of imprisonment? Could the goods of a millionaire make amends for a blasted life? Would not turning him over

to such a remedy, be a refinement of despotic tyranny worthy of a Caligula?

In the third case, he had the right to be deprived of his property, only by the judgment of his peers or due process of law. Is a right of action against the marshal a remedy for having all his property seized and delivered, by the marshal, where the law cannot reach it?

If the marshal is rich, is it certain that damages can be collected of him, after months of litigation, upon a judgment?

Is an uncertainty a remedy for a certainty?

Can anything, in any of these cases, protect the citizen but the immediate interposition of the courts?

He has the right to protection; *for that, he joined society.* Can society rob him, and refuse him protection; strip him naked, and then say he has a remedy, because he has left to him a bare claim to an uncertain and distant recompense?

I have no sympathy with a man who would offer such a remedy in such a case. It is a reason, worthy of the Scholiasts and Sophists of the middle age, worthy the ministers of the Prince of lies, who clothe a treacherous doctrine with the form of law, and seek in angels' forms and judicial ermine, alike, ruin and wrong alone.

The cases of *Payne* v. *Hook*, 7 Wallace, 430, and *Watson* v. *Sutherland*, 5 *ib.* 74, support the right clear, practical, efficient and prompt, and decide that such is the remedy intended, and of right.

Admit, then, that the act which lays this tax, is unconstitutional, and the case is the same.

The Constitution says, the property shall not be taken but by due process of law; and the legislature abrogates it and says, no court shall stay a seizure, made without law.

If any one say, we have a remedy here, let him, if his son ask bread, give him a stone; or, if he ask a fish, let him give him a serpent,—his acute reason will give him an approving conscience, if the weight of the stone, or the venom of the serpent, remedy forever the hunger of his child.

But, we have no remedy against the assessor. He is not a trespasser, inasmuch as he me merely obeys the statute. He originates nothing, commands nothing, has no discretion, can exercise no judgment. Congress sets the trespass in motion and commands the assessor to do a mere ministerial act. He cannot sit to decide constitutional questions and nullify statutes by refusing to obey them.

If the assessor or collector had any discretion in the matter, and exercised that discretion to the injury of the plaintiff, they would be liable; but a ministerial officer is bound to obey the command or warrant of his superior, which appears regular upon its face, and concerns a matter and parties within the cognizance of the power which issues it; and the writ, though void, will protect him.

Savacool v. *Houghton*, 5 Wend., 170.
Chapman v. *Dyett*, 11 Wend., 32.
Cary v. *Curtis*, 3 How., 247 and 249.

I leave this text as written, for the case of *Philadelphia* v. *The Collector*, 5 Wallace, 720, carries the remedy as far as it is possible, and leaves it liable to be defeated by the slightest change in circumstances, in the annually changing statutes.

The statute, as to the 50 cents tax, is so prepared as to protect the assessor altogether: The assessor makes the computation, but, for aught that appears in the statute, he cannot issue a warrant. His trespass is negative in computing the void tax with valid ones, and returning the total amount; the collector proceeds under the warrant of the statute, to levy and collect the whole.

The United States and its officers are wronging us, taking our property by force, without right. We have a right to protection *against them*, either by injunction or action against the actor. We cannot have an action, therefore we must have the injunction; or we have a right against the actor, without a remedy.

A man who would sell dangerous steam boilers, might be amenable for the injuries they would do. Yet, this collateral action would be no remedy against the purchaser who wilfully uses and explodes them, to the injury of the lives, limbs or property of others.

In the case at bar, however, we have seen that the remedy against the officers would be, in part, very doubtful; against the real actor, the United States, no action would lie.

And, further, if these officers act under the commands or rules of the department, they will not be liable to exemplary damages.

Tracy v. *Swartwout*, 10 Peters, 94.

Yet, these damages are given in the case of trespasses, as a sort of compensation for wrongs which can not be computed in money, are proportioned to such wrongs as nearly as may be, and are given as a remedy. Unless these wrongs can be prevented, they *must* be endured without possible remedy.

We have seen the State Courts have no jurisdiction over the subject matter. This is the only court of chancery of original jurisdiction, competent to afford the relief prayed.

SECTION VI.

The Source of Judicial Power is the Constitution alone: and the Power is Complete in the Courts.

Quite a number of cases have been decided in favor of exercising jurisdiction in those particular instances, on the ground that the statutes were sufficiently broad to give jurisdiction, if otherwise, they were without it. And in the case of *McIntire* v. *Wood*, the power to issue a mandamus *in that case*, was denied,—

1st. Because there was another, complete and adequate remedy.

2d. Because the legislature had not delegated the power to the circuit courts. And *McClung* v. *Silliman* affirms this case, and adds another point, viz: that State Courts have no power over Federal officers.

The second point, *i. e.*, that the legislature had not given the power to the circuit courts, was not necessary to the decision of the cases. Yet, it cannot be denied that it expresses a position, tacitly assumed to be correct in many cases, viz.: That the powers of the courts were derived from the grant of Congress, and only existed by virtue of its delegation.

It is true, however, that it was not necessary to a decision of any of the cases, above referred to, to define the power of Congress in the matter. It was sufficient in all, but *McIntire* v. *Wood*, that the statutes of Congress had

declared that they should exercise certain powers; and if Congress had power to enact declaratory acts, the question, as to whence the power was derived, need receive no careful exposition if the case was within the judicial powers of the United States, granted in the Constitution.

In one case only (*Marbury* v. *Madison*) was it necessary to enquire, even, whether the power existed, (in all others, but *McIntire* v. *Wood*, it was admitted,) and the court rendered its decision thus (1st *Cranch*, 154): "In the "order in which the court has viewed this subject, the fol- "lowing questions have been considered and decided:

"1st. Has the applicant a right to the commission he "demands?" The decision is affirmative.

"2d. If he has a right, and that right has been violated, "do the laws of his country afford him a remedy?" The decision is affirmative.

"3d. If they do afford him a remedy, is it a mandamus "issuing from this court?"

This is answered, p. 173. It is a mandamus; and it only remains to be inquired, "Whether it can issue from this court." And the decision is, that the jurisdiction of the Supreme Court is appellate only, and, as a necessary sequence from the affirmative replies, that the courts which are not exclusively of appellate jurisdiction can grant this remedy.

Marbury v. *Madison*, decided that the laws of his country afford him the remedy. *McIntire* v. *Wood* and *McClung* v. *Silliman* decide that the statutes of Congress do not afford him a remedy.

Either his remedy is afforded by a law of his country, outside and independent of congressional enactment, or *Marbury* v. *Madison* is not law.

The necessities for such remedies in our happy country were few, and the cases small, so that no one has undertaken to go to the foundation, and attempt to obtain an authoritive and direct decision as to the question, whether *Marbury* v. *Madison*, was, or was not law. And the bar seems to have settled, quietly and without reasoning, to the opinion that the powers of the courts are derived solely from the grant of Congress.

But when it was held in this case, on a petition for a mandamus, in the Circuit Court, upon the general impression and language of *McIntire* v, *Wood;* and *McClung* v. *Silliman*, (which has attained undue prominence in the text books, owing to the superficial examination of their writers,) that the Circuit Court had no power to afford the only adequate remedy, because Congress had not granted it the power by special statute; and when the defence interposed to a prayer for injunction, was the clause in a statute, " that no suit shall be maintained to restrain the " collection of any tax,—though such restraint should be of right, and the injunction the only remedy,—the question was raised in such a form that I cannot evade it,—and the case at bar, and the sixteen other cases, of which this was originally intended to be the test,—and more than all, the great question of the right of every citizen to a remedy in the courts, for every wrong, compels my action.

While the answer to the questions could be, that the statutes had given, or declared the power and remedy, it was not necessary to go farther;—but here the position is, that the statutes have not given or have taken away, the power to afford a remedy for an acknowledged and vested legal right; and we must go on, and try the statutes themselves, in the one case, and examine the source and extent of power, in both.

From the magnitude and importance of the subject, I approach it with diffidence. Because I believe that duty compels, I present it.

"The Congress shall have power * * to constitute "tribunals inferior to the Supreme Court."

This word' "constitute," means originally to set, or fix. 2d, to form or compose, or to give formal existence to (tribunals), and 3d, to appoint to an office or employment.

The word, "tribunals," undoubtedly means courts of justice.

A court is nothing without its process.

A court will not take cognizance of a cause, not brought before it by regular process.

Wilson v. *Daniel*, 3 Dallas, p. 410.

Hence it follows that if a court is constituted, it has, as the necessary adjunct of its existence, the power to issue such process as is necessary to bring before it, cases for adjudication, and to carry its judgments into effect.

And this power, if it exists, at all, is necessarily complete and sufficient for all cases cognizable by it.

The only answer to this position is of this purport:

The court, being no tribunal until it has the means of bringing or having brought before it cases for judgment, is not constituted, and is not a tribunal till these means are provided; and the provision of these means is the last act in forming its existence. And the means given may be limited by the power which constitutes the court.

To this answer we say, *first*, it is insufficient upon precedent.

Two precedents are found in the opinion delivered in *Jennings* v. *Carson*, 4 Cranch, 1 p. 22, by MARSHAL, C. J:

"It appears that the court of New Jersey, which con-
"demned the George and her cargo as prize, was estab-
"lished in pursuance of the recommendation of Congress,
"and that no legislative act had prescribed its practice or
"*defined its powers* (in 1780). The act produced in court,
"was passed at a subsequent period, and consequently
"cannot govern the case. But the court cannot admit the
"correctness of the argument drawn from the act by the
"counsel for the plaintiff in error. It cannot be admitted
"that an act defining the powers, and regulating the prac-
"tice of a pre-existing court, contains provisions altogether
"new. The reverse of this proposition is generally true.
"Such an act may rather be expected to be confirmatory
"of the practice and the powers really exercised."

"This reasoning is illustrated, and its correctness in a
"great measure confirmed by the legislation of the United
"States, and the judicial proceedings of our own country."

"By the Judicial Act, the District Courts are also
"Courts of Admiralty, and no law has regulated their
"practice. Yet they proceed according to the general
"rules of the Admiralty, and a vessel, libelled, is always in
"possession of the law."

From this it appears that the New Jersey Court was fully constituted, though no statute gave it any process or defined its power; and from the whole opinion it appears that this establishment was an appointment to the office or employment of administering justice, and the court, fully constituted by being barely called into existence, exercised as its right judicial powers through process, usual, and adapted to such cases as it was to adjudge.

This was in 1780, and shows quite conclusively what, at that time, it was deemed necessary for a legislature to do, in order to constitute a court.

It also appears that, in the year 1800, the district courts had, for eight years, exercised the powers and administered adequate remedies in admiralty, not by virtue of any delegation of process from Congress, but because they had been constituted Courts of Admiralty.

From this contemporaneous construction,—extending ten years before and ten years after the enactment of the Constitution,—it seems clear that its framers did not intend or suppose that a court, which would be a cypher, a ten, a tenth, an infinitely small fraction, or an infinitely large quantity, would be constituted according as Congress should attach units of process to the left or right of the cypher, or should fail to perform, for it, this final act of constitution or creation. It is clear that they believed that a court of admiralty could be constituted, and though no statute gave it process, could bring cases before it for judgment in admiralty, and execute its decrees.

And that they also must have believed that courts under the Constitution, framed by them to establish justice could be constituted, which could administer justice, without any express grant of process from any source.

And from the language of the whole decision, it appears that the power to regulate process, was not given to Congress by the provision authorizing it to constitute courts.

Second. The answer is insufficient upon principle and upon the only reasonable construction of Art. 3 of the Constitution:

"The judicial power of the United States shall be vested "in one supreme Court, and in such inferior Courts as the "Congress, may, from time to time, ordain and establish. "The judges both of the supreme and inferior Courts, shall "hold their offices during good behaviour; and shall, at

stated times, receive for their services, a compensation, which shall not be diminished during their continuance in " office." (Art. 3, Sec. 1.)

" (1.) The judicial power shall extend to all cases in " law and equity, arising under this Constitution, the laws " of the United States, and treaties made, or which shall " be made, under their authority; to all cases affecting am- " bassadors, other public ministers, and consuls; to all " cases of admiralty and maritime jurisdiction; to contro- " versies, to which the United States shall be a party; to " controversies between two or more States, between a " a State and citizens of another State, between citizens of " different States; and between citizens of the same State " claiming lands under grants of different States; and be- " tween a State, or the citizens thereof, and foreign States, " citizens or subjects." (Art 3, Sec. 2, (1.)

" In all cases affecting ambassadors, other public min- " isters and consuls, and those in which a State shall be a " party, the supreme Court shall have original jurisdic- " diction. In all the other cases before mentioned, the " supreme Court shall have appellate jurisdiction both as " to law and fact, with such exceptions, and under such " regulations, as the Congress shall make." (Article 3, Sec. 2.) (2.)

The judicial power of the United States, extending to all cases in law and equity arising as designated, and to all the other controversies designated, shall be vested in one supreme Court, and in such inferior Courts as the Congress may establish. In a few cases, the supreme Court shall have original jurisdiction; in all the others it shall have appellate jurisdiction.

Upon the appellate jurisdiction, it was said in the case of *Durousseau* v. *U. S.*, 6 Cranch, 307, (A. D. 1810) p. 318:

"It is contended that the words of the Constitution "confer an appellate jurisdiction in this court, which ex- "tends to every case not excepted by Congress; and that "if the court had been created without any express defini- "tion or limitation of its powers, a full and complete ap- "pellate jurisdiction would have vested in it; which must "have been exercised in all cases whatever.

"The force of this argument is perceived and admitted.

"Had the judicial act created the Supreme Court with- "out defining or limiting its jurisdiction, it must have been "considered as possessing all the jurisdiction which the "Constitution assigns to it.

"The legislature would have exercised the power it "possessed, of creating a supreme court, as ordained by the "Constitution, and in omitting to exercise the right of ex- "cepting from its constitutional powers, would have "necessarily left those powers undiminished. The appel- "late powers of this court *are not given by the judicial act*; "*they are given by the Constitution.* But they are limited "or regulated by the judicial act, and by such other acts "as have been passed on the subject."

Observe here that the right to limit the appellate powers *is expressly given* by the Constitution, and *no power* to limit the power of original jurisdiction of either the inferior or supreme court, is given by any provision; nor is it necessary, to carry into effect the powers granted. And, further, that constitutional provision was necessary to take away the power of original jurisdiction in cases to which a State is a party, or to control the construction of the power granted. (Amendment XI.)

Observe, again, the article, giving the judges of the supreme and inferior courts (neither of which were then created) the same tenure of office, and the same permanency of compensation, giving to both supreme and inferior courts (neither of which were then created) the judicial power extended to all cases; providing that the jurisdiction of the supreme court should not be original, in any but two classes of cases, but that it should be appellate in all the other cases mentioned;—and can we hesitate to say that this article contemplated a judicial system, consisting of courts of original and appellate jurisdiction which did not then exist; that where, in the first section, it gave the judicial powers to the supreme Court as an appellate court in all but the excepted cases, and original jurisdiction as to them, it gave corresponding powers as to the other courts named; and that they must, in the language of the court, be considered as possessing all the jurisdiction which the Constitution assigns to them, viz: original jurisdiction, and the judicial power of the United States in the cases named. *Wilson* v. *Mason*, 1 Cranch, 91 and 92.

This appears to be the doctrine of

Marbury v. *Madison*, 1 Cranch, 154.

Third. The third answer to the position taken is, that the very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury; and that "all possible injuries "whatsoever, that do not fall within the exclusive cogniz- "ance of either the ecclesiastical, the military or maritime "tribunals, are for that very reason within the cognizance "of the common law courts of justice." (For authorities see *Marbury* v. *Madison*, cited ante). I will show, hereafter that the courts of original jurisdiction are, as to the cases mentioned in the Constitution, common law courts of justice.

SECTION VII.

From these points it appears that the inferior courts of the United States have complete power, in all cases, and between the parties named in the Constitution, to grant a remedy for every wrong.

1st. Because such power is incident to their existence, and was exercised by courts, constituted both before, and under the Constitution, without any delegation whatever, from the legislature which created them.

2d. Because in all cases under the Constitution, the laws and treaties of the United States, and in all cases between the parties named in Art. 3, S. 2, for purposes of original jurisdiction, the whole judicial power of the United States is, by the Constitution, delegated to them.

3d. Because this is the only construction of the Constitution, which can accomplish its objects, can establish justice, secure the essence of civil liberty, perpetuate common law security, which every one of its framers had before that, time enjoyed, and avoid the monstrous absurdity that in attempting to frame a free government, the people not only divested themselves and their posterity, but actually threw away the very essence of civil liberty.

The power to regulate process, is derived from the grant to Congress, of the power "to make all laws, necessary and "proper for carrying into execution all powers vested by "the Constitution in the government of the United States, "or in any department or officer thereof." (Art. 1, Sec. 8, (18.)

We have seen that the whole judicial power of the United States is vested in the courts; and we now come to the inquiry: What powers of regulation, control and limitation, has Congress over the subject? And we find that its powers of regulation are exceedingly ample: If it shall be necessary and proper to carry into execution the power granted to the courts, Congress may divide the country into districts and establish courts in each, with judges, clerks, commissioners, masters and other officers requisite to complete mastery of the business of the court. It may establish appellate courts, inferior to the supreme court, may regulate appeals to the supreme court, and except, from the jurisdiction of that court, all or any cases, which the objects of the Constitution shall not require to be decided by the highest judicial authority in the land.

Uniformity of process, and arrangement of terms and forms, so as to be particularly adapted to the circumstances and characters of the people and their grievances, are desirable to carry into effect the powers delegated to the judicial department,—and Congress may regulate them for that end.

In short, Congress may make any law which shall carry into execution the powers vested, by the Constitution, in the judicial department.

But can Congress make any law, limiting the powers vested in the judicial department, or, to prevent their execution? or can it by any act deprive the courts of any portion of the whole judicial power of the United States?

The answer is, It cannot.

The Constitution did not constitute, ordain or establish a supreme court; it did not even name it, but provided for its jurisdiction, leaving to Congress to create it, name it, and arrange every detail of its constitution.

Nor did the fundamental law constitute, ordain, or establish tribunals inferior to a supreme court; it only provided for their jurisdiction, leaving to Congress to arrange every detail of their constitution—that is, every detail but two: (1) the appointment of the judges, and (2) their tenure of office and compensation.

But the Constitution vested in this department, the judicial power of the United States.

If Congress can limit the power, or take away any portion, it can take away the whole, and divest what the people vested.

One argument grotesquely claims the right of Congress to divest the courts of judicial power, under the provision that Congress shall have power to constitute tribunals inferior to the supreme court, and make all laws necessary and proper to carry this power into execution.

To constitute a "tribunal," that is, a court of justice, a seat and forum of judicial power.

To "constitute" it; that is, to set, to fix, to place, to give formal existence to it;—and this argument grotesquely urges that this is an authority to unseat, displace and destroy the formal existence of this judicial power itself.

It seems to me that it is quite the contrary. The judicial power is beneficial to all the people; and the people in their absolute grant intended to give its benefits to all the people, as fully as they or their ancestors had ever enjoyed the benefit of judicial power.

They granted it to the judicial department, and vested in Congress the power to make all laws necessary and proper to carry this judicial power into execution. But they did not grant to Congress the power to prevent the carrying into execution of this power, by any means whatever.

It will not be claimed that Congress can directly destroy the judicial power of the United States, and, if it cannot do it directly, from defect of power, it cannot indirectly.

Wayman v. *Southard*, 10 Wheat. 1, p. 50.

And there can be no more perfect destruction of judicial power than to so forbid or prevent the means necessary, that, in a case of complete, absolute and acknowledged right, it is absolutely powerless to afford a remedy.

SECTION VIII.

The Courts of Original Jurisdiction are, as to all the cases mentioned in the Constitution, Common Law Courts of Justice.

The Congress shall have power to constitute tribunals inferior to the supreme court, was the enactment of the people, and the delegation of their authority.

Again, they said, the judicial power of the United States shall be vested in the courts.

And again, by an almost contemporaneous amendment, no person shall be deprived of life, liberty or property, without due process of law.

It is clear that by Tribunals, they intended courts, and that whatever power the courts should exercise, should be judicial power, and that the exertion of this power should be through due process of law.

There had existed many kinds of laws, and tribunals for their administration:

The laws of the Medes and Persians were fixed, and the nation prospered and became great under them. Infidelity has doubted the miracle; but history has shown indisputably that the code of laws, the tribunal, the judicial power, and the "process" of this nation, is clearly mirrored in the 6th Chapter of Daniel, and that Daniel himself was deprived of his liberty and cast into the Lion's den, upon a deliberate decision of the judicial power, that he was

guilty of a crime against the law of the land, and must suffer the penalty, to which he was then consigned, by due process of law. The proceedings against his accusers appear to have been less deliberate, and, whether they were eaten, in the due course of Persian justice, does not clearly appear; but, accepting even the more favorable exhibition in the deliberate condemnation of Daniel, we are certain, the people, in framing the Constitution, did not have in mind any such tribunal, judicial power or process, as that of the Medes and Persians; and we must reject any interpretation of the words which would put on them a meaning clearly not intended by the parties adopting them.

It is not denied, either, that the arrest and trial of Christ was had according to due course and process of the mixed jurisdiction of Roman and Jewish law. The process of arrest was, according to the usual custom of arresting thieves, by military order; the trial was before a court, organized to convict, and which sought false witnesses against him, to no effect; but having found constructive treason in a few words, continued their judicial functions and examinations by spitting in his face, buffeting, smiting and taunting the prisoner.

Travellers in the East say that this account is not exaggerated, and that in many nations, to this day, such are regarded as the regular and proper exercises of solemn judicial trial.

It seems, however, that this court was divested of one essential element of judicial power, *i. e:* the power of execution, and that the accused had to be taken before the Roman Court, which had full power and jurisdiction in the case.

From the report of this case, as we find it in 27th Matt., it appears that this Roman Court allowed to the accused

the presumption of innocence, upon trial *acquitted him*, then awarded execution, and tortured and hung the defendant.

It is quite evident that the people, in the Constitution, did not intend rabbinical law or tribunals, much less Roman Provincial law and Judicial Power, or much less the poetic justice of Herod, who, for his oath's sake, and impelled by his duty to keep it, beheaded John, and in due course of law executed James, first, and tried him afterwards.

Nor did the people intend to perpetuate the ostracisms of the Greeks, or the political judgments, rendered by ballot in early Rome.

The tribunals of Patrician Senators and the rescripts of Emperors were not to be, for them, tribunals or judicial powers.

Trials by ordeal, torture or inquisition; the courts and so called judicial proceedings of kings and potentates in the middle age, trials by Courts of Commission, like those of Empson and Dudley,—none of these were associated in the minds of the people with the names of Courts, judicial power and due process of law; nor were the tribunals, then in use all over Europe, where the justiciary questioned the parties, and pronounced judgment from his impressions only,—intended by them, when they spoke those well known words.

Of this I speak confidently; for, the people of every State, and their ancestors, from time whereof the memory of man runneth not to the contrary, had been accustomed as jurymen to form an integral part of courts, had invoked and experienced judicial power, had administered, witnessed and been coerced by due process of law. Not one of the original States had held the civil code, and in every one, without diversity, the same general ideas were conveyed by the words, court, judicial power, and due process of law.

If any one doubts this, let him go through the United States to-day; and as the conditions are the same now as then, he will find the answers now as then; except that, separated farther from England, the prerogative power of the king in court will be a little less clear. Now, as then, he will ask a people, who, as jurymen, have been accustomed to form an integral part of courts, have invoked and experienced judicial power, have administered, witnessed, and been coerced by due process of law.

The words to day, have a usual and commonly received meaning, and they had then: and in construing the statute of the people, the plain, usual and commonly received meaning of the words, must be adopted by the courts.

The ideas, called to their minds, and their understanding of the words, made them only to designate common law judicial power, common law process of law; not common law, as tehnically distinguished from equity and admiralty; but as designating all courts, judicial power, and due process, which had existed from time whereof the memory of man runneth not to the contrary, in the States, Colonies and Mother Country.

Whoever denies this application of the doctrine, either claims that the people did not know the meaning of the words, and that, in using them, they acted as one walking in his sleep, aimlessly; or that they were familiar with all systems, powers and processes, which anywhere had, or could bear the names, and intended to give to Congress, a wild, errant, and extravagant power to select among them all, or to experiment and create a novelty to be christened by the ancient names.

Without external authority, and without passing beyond the clear meaning of the words, we have found our propos-

ition true; but we will accumulate authority and look beyond the words themselves, to others, coupled with them in the Constitution.

We find that the judicial power shall extend to all cases, in law and equity,—this division, is a division of administration, known only to common law courts, and common law judicial power. The words are technical, and their technically received application coincides with the commonly received meaning of the judicial power and courts, to which they are affixed;—the application of the power is complete, and covers all cases, arising under the Constitution and the laws, and treaties of the United States.

The delegation of power extends beyond, and, in cases over which an appellate power was granted to the supreme Court, gives to the inferior Courts original jurisdiction in controversies between citizens of different States, in cases not arising under the Constitution, treaties or laws of the United States.

In every State, the bulk of their law was the common law, the statutes were very few; and the bulk of controversy between citizens of different States were those questions of common law, to be decided by the common law, or ignored, according as these courts, judicial powers and process, were vested with common law jurisdiction, or without it.

The trial of all crimes shall be by jury. A jury, then, is to form an integral part of these courts, and to receive and exercise the judicial power. It is demonstrated from authorities, now firmly fixed, that nothing but a common law jury can satisfy the requirement of this provision. All crimes are to tried by jury; that is by the common law tribunal for the trial of crimes.

The writ of *Habeas Corpus* shall not be suspended. When or how was this "writ" ever granted to the courts?

Why does the Constitution presume that the courts will have the power to issue the writ, at all? It cannot, certainly, intend to confine itself to State courts, for they have no jurisdiction to release persons, in custody of United States courts, under United States laws. Nor can it be anticipated that Congress will give it,—a strictly common law remedy,—to their novelties, if they have a *carte blanche* in the matter of making tribunals.

It was a power inherent in courts of common law,—it existed then as a power (in abeyance perhaps, for want of courts to exercise it), a power which should not be suspended but because of the special danger. If it required a special Act of Congress to vest it in the courts, Congress could suspend it, indefinitely, without cause, by mere inaction.

The Constitution says, nothing shall suspend it, and, of its own action destroys the effect of any inaction of Congress, recognizes it as an existing, unsuspended constituent of the judicial power, and vests it in the courts. Not in the Supreme Court alone, for under *Marbury* v. *Madison*, except in the cases of ambassadors, &c., that court has not original jurisdiction; but as this judicial power extends to all cases arising under the Constitution, it must be, and is, vested by the Constitution directly in the courts of original jurisdiction, or exists in them as a necessary constituent, without grant; for, if not, then, notwithstanding the Constitution, the writ of *habeas corpus*, in some cases arising under the Constitution, might have been indefinitely suspended, without any cause, from mere inaction or inadvertance of Congress.

Presentment and indictment were prescribed only by common law; and for due process of law we have been referred back to Magna Charta and Lord Coke's commentaries, for its definition, and to the common law precedents.

In suits at common law, the right of trial by jury shall be preserved, and no fact, tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Common law, *habeas corpus*, indictment and presentment by grand jury, and trial by jury, in all cases of crime, re-examinable only according to the rules of common law, suits at common law to be tried by jury, and, finally, no man shall, as a penalty for crime or to pay a debt, be deprived of life, liberty or property but by due process of the common law.

Now, what is a common law court of justice? Is it not one which administers common law remedies for common law rights, according to due process at common law? If so, the Constitution has sustained our postulate.

And if the common law was fully recognized as a living, existing reality by the Constitution, then common law rights, to complete remedies for every wrong, exist under the Constitution, and, if they exist, may be administered by the conservator of the judicial power of the United States.

If they exist fully in the courts, our demand has been properly made on them. If they do not exist in the courts but, as stated in *McClung* v. *Silliman*, exist in Congress, not delegated to the courts, then Congress must hear our prayer, judicially ascertain our rights and grant us an injunction; for, if the common law exists as a living reality, recognized by the Constitution, the remedy which the common law provides for every wrong, exists, and can be exercised by the conservator thereof.

That Congress fully recognized the existence and binding force of common law, and the perpetuity of all its essential features, appears in scores of places in the Judiciary Acts of 1789, 1791, and 1792. I will not weary the court with the recitals.

SECTION IX.

Having determined that the common law, as a system of principles, forms the substratum of all our laws, and occupies that wide space which the statute does not, or cannot occupy, and furnishes the rules of security, liberty and property, which regulate society, and determine the rights of persons and things in general.

Having determined, also, that the words: tribunals, courts, judicial power, and law of the land, had fixed and definite meanings, in which they were used, which were derived from the customs and books of our ancestors, in this country, and, more especially, in that country from whence we originally derived our knowledge of the administration of the common law, through courts of justice,—we shall gather additional light upon the meaning of the words used, the sources of the powers vested, the extent of the powers, and the manner of their exercise, by recurring to them as they appear in authorities and history, in that country.

First noting the definition given by a lexicographer in our own country, where the rapid accumulation of population in the older States, has called into existence a vast number of courts, and their creation has become an almost every day affair: Mirroring the popular idea, Bouvier defines a court to be an incorporeal political being which requires for its existence the presence of judges, a clerk, a time and place, when and where it is authorized to

be held, and the performance of some public act, indicative of a design to perform the functions of a court.

We proceed now to England.

According to Lord COKE, a court is, a place where justice is judicially administered. (*Co. Litt.*, 58 *a.*)

But as BACON has developed the principles more in detail, and with such truth that they have never even been questioned, we will take as our text quotations from the ABRIDGMENT, under the title "courts."

SECTION X.

Under this title, division (A.) shows, very briefly, the history of courts, from the *witten-agemote* of the Saxon, through the time of William the Conqueror, to the original "of our courts, as we have them this day in West-" minster Hall. To give countenance to this new erection " and division of courts (which was completed by Edward " I.), and also that it might still be seen that all justice " flowed from the king, the king himself sat in person in " the Court of King's Bench. (*Speed*, 521 ; *Roll. Abr.*, " 535.) But, though the king was sometimes present, yet " the Chief Justice gave the rule, that the king might not " decide in his own cause.

" It is still supposed to have always the king himself sit-" ting in it. (*Dyer*, 187, *pl.* 6. *Crompton on Courts*, 88.)

" But however this regulation might have begun, or " however it might have been formerly, as to the king's " sitting and determining causes, it seems now agreed, *that* " *the king, having delegated his whole judicial power* to the " judges of his several courts, those judges, by the long, " constant and uninterrupted usage of many ages, *have now* " *gained a known and stated jurisdiction, regulated by cer-* " *tain and established rules, in which the king himself can-* " *not make any alteration without an Act of Parliament.* " (2 Inst. 75; 2 Hawk., P. C. 2.)

" *But as the king is the fountain of justice* * * no " court, whatsoever, can claim any jurisdiction unless it " some way or other derive it from him."

From this it appears, 1st. That all justice distributive flowed from the king.

2d. That, though present, he never delivered it in person under the present form of courts, but the judge.

3d. That the king has delegated his whole judicial power to the judges of his several courts.

4th. That by the long, constant and uninterrupted practice of many ages, the judges have gained a known and stated jurisdiction, which cannot be changed without altering the Constitution of England.

5th. No court whatever can claim any jurisdiction, except that derived by it from the fountain and source of justice.

6th. That, as the king had, originally, the prerogative to dispense justice for every case, and has delegated his whole judicial power to the judges of his several courts, who have a known and stated jurisdiction, which cannot be changed but by a change of the Constitution, and no court has any jurisdiction from any other source,—there can be no failure of justice, because the whole system has all the original, absolute judicial powers of the king; and this system, with its absolute judicial power, was the constitutional right of every Englishman.

We have seen that the colonists brought with them to America every right which they or their ancestors had ever possessed in the Mother Country, (*Decl. of Independence*), that a special grievance was, that the full and complete system of judicial power was denied to America, and that they claimed and had a right to trial by a jury of the vicinage, in every criminal proceeding, and a complete and accessible remedy at law for every wrong.

SECTION XI.

"The king himself, though he be entrusted with the "whole executive power of the law, cannot sit in judg- "ment in any court, but his justice; and the laws must be "administered according to the power committed to, "and distributed among his several courts of justice. (4 *Inst.*, 70, 71; 2 *Inst.*, 103, 8 *H.*, 4, 13, *b.*; *S. P. C.* 54; *Dalt.*, *c.* 1.)

"All judges must derive their authority from the Crown "by some commission warranted by law, * * *and* "*now, for the greater security of the liberty of the subject by* "12 *and* 13, *W.* 3, *C.* 2, *their commissions are to be quam-* "*diu se bene gesserint.* * * *

"* * The judges are bound by oath to determine ac- "cording to the known laws and ancient customs of the "realm, and their rule herein must be the judicial de- "cisions, and resolutions of great numbers of learned, wise "and upright judges, upon a variety of particular facts "and cases, and not their own arbitrary will and pleasure, "or that of their prince. (Vide Statutes, 18 E. 3, C. 1; 20 "E. 3, C. 1, 2; 4 Inst., 88, 109; Dalt., 13.)

From this appears:

1st. A similarity between their sovreign and our sovreign: The King cannot sit in judgment in any court, but *his* justice; neither can the People but *their* justice.

2d. The laws must be administered according to the power committed to and distributed among his several courts of Justice. *Must*, is an absolute controlling word,

and admits no deviations for policy. *According to the power committed to*, i. e. the whole judicial power of the sovereign, which, all complete, *is distributed* among his several courts of Justice.

Read, in this light, the Constitution: The Judicial power of the United States, shall be vested in what? A system complete and perfect, and capable of receiving the whole delegation? or in one supreme Court, to which only a limited portion is distributed, and in a garbled and limited, and imperfect state only,—in an incomplete system?

Was it not equivalent to saying: as the whole judicial power in England, is vested in, and distributed among her courts, and the laws must be therein administered according to the power committed to their care,—so we, the people of the United States, to establish justice and secure liberty, do vest in, and distribute among our courts, the whole judicial power of the United States? True, Congress had to constitute the tribunals inferior to the supreme Court. Did it not constitute the supreme Court itself?

Where is the difference in their constitution? Could the supreme court ever have acted, or had a name, if Congress had not passed a law necessary and proper to carry into execution the powers, vested in the judicial department of the government? To do this the people trusted Congress; they made the outline; they delegated the power to each department; the details of arrangement to make and keep the grant of power effectual in each department they entrusted to Congress, trusting that Congress would carry out their intentions. Congress did pass the Judiciary Acts:—the portions creating the courts being original enactments, the other portions being only declaratory of existing law, or a mere distribution or arrangement

of details, to give full effect to the judicial power. Any other construction stultifies the people and criminates that First Congress,—making it a betrayer of its trust, an embezzler of the powers confided to it.

3d. We again find that all judges must derive their authority from the Crown by some commission, warranted by law.

From this it appears that a commission, issued by one power, was but the channel through which the power was derived from another.

And this is positive destruction to the argument that, because Congress may commission courts, it may limit their power. The authority was derived from the Crown; but the commissions came from some person or body which the law had empowered to designate the receiver of the authority.

4th. The greater security of the liberty of the subject is the object of prime solicitude; and the power which can give the commission, having named the recipient, is *functus officio.*

5th. The decisions of the courts must be according to common law principles, customs and laws. This was a rule of the Constitution, and could only be changed by the power that could remodel the Constitution. The authorities show it to have existed before Edward III. or Coke, at a time when the king had power to do almost everything but change the Constitution.

SECTION XII.

The division of the courts, among which the whole judicial power power of England was distributed, we find to be as follows:

"The most general division of our courts, is into such "as are of record, or not; those of record are again "divided into such as are supreme, superior, or inferior. "(Hale's An., 35.) The *supreme court* of this kingdom is "the high court of Parliament, consisting of the king, "lords and commons, and is invested with a kind of omni-"potency in making new laws, repealing and revising old "ones; and it is on the right balance of these depends "the well being, and indeed the very being, of our Con-"stitution. (Hale's An., 35.)

"Superior Courts of record are again those that are "more principal or less principal; the more principal ones "are the lords' house in Parliament, the Chancery King's "Bench, and Exchequer.

"The less principal ones, are such as are held by com-"missions of jail delivery, oyer and terminer, assize, *nisi* "*prius*, &c.; by custom or charter, as the courts of coun-"ties palatine; or by virtue of acts of parliament, and the "king's commission, as the court of sewers, justices of the "peace, &c. (Hale's An., 36.)

"The inferior courts of record, as ordinarily so-called, "are corporation courts, courts leet, and sheriffs' tourns. "Hale's An., 36," Ses 1 Johns' cases 179, 181, 2 Caines, 319.

"All these are bounded and circumscribed by certain "laws and stated rules, to which in all their proceedings "and judicial determinations they must square themselves. "(Hale's An., 35.)

"Every court of record is the king's court * * * "all such courts are created by act of Parliament, letters "patent, or prescription; and every court, having power "given it to fine and imprison, is thereby made a court of "record."

Upon this we note:

1st. The general division into courts of record and those not of record, is here well understood.

2d. A failure to remember the division of courts of record, into supreme, superior, and inferior, has probably caused the necessity for the argument of the case at bar.

The supreme Court of England is the high court of Parliament. This the people remembered when they said, the judicial power of the United States, shall be vested in one supreme Court, like Parliament, the highest court; for they remembered that which in England is ever to be remembered, that in the ascending courts of error, the real, ultimate and last resort of judicature is in the whole Parliament, King, Lords and Commons, to correct all mistakes, and repair every possible wrong. (Dwarris, 123.)

The people well remembered this omnipotence of judicial power to correct all mistakes and repair every possible wrong; and while they themselves had, like Parliament, legislative power to make any law, and judicial omnipotence to remedy every wrong, and while they vested no omnipotent legislative power in any department, they did enact that "*the judicial power of the United States shall be vested.*"

From the foregoing we see what the people considered

as a supreme Court. Though the king's prerogative power was (as has been said) exercised by the Court of Kings Bench, the supreme Court, being the highest in authority could correct its errors, and control its proceedings. The name "supreme," did not even belong to the Court; it described only its attributes.

Again: the courts were divided into this supreme, and the superior and inferior Courts, both of which were inferior to this supreme Court. And when Congress was empowered to constitute tribunals, inferior to the supreme Court, the people had in view the fact that all the courts of England were inferior to the high court of Parliament, which was the one supreme Court.

3d. As Congress was thus empowered to constitute tribunals inferior to the supreme Court, and in fact to constitute the one supreme Court itself, it is evident that when the subsequent clause vests the judicial power in one supreme Court, and in such inferior courts as Congress may establish, all tribunals inferior to the supreme Court are intended, including those technically described as superior and inferior courts of record, and also courts not of record. This appears more fully, as we see, from our author in this same connection, that courts of admiralty are not courts of record. And as the judicial power of the United States extends to all cases of admiralty jurisdiction, and as that jurisdiction is vested in the inferior Courts, established by Congress, it is clear that by the words, "inferior Courts," no limitation to inferior courts of record was intended; but all courts inferior to the one highest in authority, which might be necessary to complete the system, were within their purport.

4th. Again: as this system was complete, and as the people evidently desired that there should be no failure of

justice, they empowered Congress not only to constitute such tribunals as were then needed to receive and exercise all the judicial power granted, but also from time to time to ordain and establish such Courts as should become necessary and proper to keep the system perfect and complete; and by accepting this delegation of power, Congress was bound to exercise it, so as completely and in good faith to carry out the whole intention of the people. This affords a rule for construing what Congress has done, as we shall see hereafter.

5th. One of the rules of English constitutional liberty, to which the courts must in all judicial decisions square themselves is, that there shall be no failure of justice; some Court must of necessity have power to protect the right, and some writ must be found for the case, even though it is necessary to frame an original writ.

6th. Every Court of record, the inferior as well as the supreme, and whether created by Act of Parliament or by letters patent direct from the king,—all are the king's courts; their authority is derived from him.

This disagrees with the idea of Justice Johnson, that Congress had not vested its judicial powers in *its* Courts. The sovereign people's judicial powers are vested in *their* courts; whether created by act of Congress or by direct patent from the people, all are the people's courts, and their authority is derived from them.

SECTION XIII.

Bac. Abr. title "*Courts.*"

(D.) (3.) "The Courts of Westminster are the supe-
"rior Courts of the Kingdom, and have superintendancy
"over all other courts by prohibition, if they exceed their
"jurisdiction, or writs of error and false judgment of their
"proceedings; and everything is supposed to be done
"within the jurisdiction of the superior courts, unless the
"contrary especially appears; on the other hand, nothing
"shall be intended within the jurisdiction of an inferior
"court, but what is expressly alleged." * *

"In local actions inferior courts have a jurisdiction." *
* * *

(4.) "Inferior courts are bounded in their original crea-
"tion, to causes arising within such limited jurisdiction;
"hence it is necessary for them to set forth their authority;
"for, as has been already observed, nothing shall be
"intended within the jurisdiction of the inferior court, but
"what is expressly alleged to be so.

"Therefore, if an action is brought on a promise in a
"court below, not only the *promise*, but the *consideration*,
"must be alleged to arise within the inferior jurisdiction;
"for, a debtor who has contracted a debt, does not, by
"coming into the limits of such jurisdiction, give a court
"authority to hold plea thereof; nor is it sufficient to
"allege the cause of action within the jurisdiction of the
"court, but it must be proved upon the trial; and if the
"plaintiff proves a consideration, out of the jurisdiction, it

" cannot be given in evidence; and if it be, the defend-
" ant's counsel may propose a bill of exceptions, and upon
" such bill of exceptions, the judgment will appear to be
" erroneous.

" But here a distinction must be observed between
" counties palatine, and other inferior courts; for a county
" palatine is a general court for all the subjects of the pal-
" atinate, and not merely for all causes arising within that
" palatinate; for, if a debtor goes from a foreign county,
" into a palatinate, his obligation goes along with him, as
" much as if he went from one kingdom into another; and
" if it were otherwise, a palatinate jurisdiction would be a
" shelter and asylum for debtors, for no process but the
" supreme prerogative process runs there; and therefore
" it is determined, that, though the cause of action be out
" of the palatinate, yet, if the party be a subject of that
" palatinate, as he is by coming into that dominion, that
" the action may be brought against him there."

This long quotation is introduced to show clearly the reason of the decision, that the inferior Courts of the United States are not technically, nor in any sense, inferior courts.

Kemp's Lessee v. *Kennedy*, 5 Cranch, 185.
McCormick v. *Sullivant*, 10 Wheat., 199.
Kennedy v. *Ga. State Bank*, 8 How., pp. 611 and 612.
State v. *Bank of America*, 4 Dal. 11.

Upon this we note:

1st. As every thing is supposed to be within the cognizance of a court of superior jurisdiction, and as they were the superior Courts of England, the subject matter of every violation of any right, claimed under the laws of England, was placed within their jurisdiction by the English Constitution.

2d. The Courts of the United States inferior to the supreme Court, representing and succeeding the courts of England, which were inferior to her supreme Court, had vested in them, by the Constitution, the supreme prerogative process.

3d. The Chancery was a more principal superior Court, invested with power to grant remedies, where the law could not; and if the people intended to delegate their judicial power, the full power of chancery should be found in some court or courts of original jurisdiction in the United States. And for the same reason the power to issue a mandamus in every case where it is the only adequate remedy, should be found somewhere in existing courts.

SECTION XIV.

" (E.) What is incidental to all courts in general.

" If the King grants a court, by letters patent, to a corpo-
" ration of a town, to hold pleas, &c.,—in this case, though
" there is not any clause in the patent to make a bailiff, or
" sergeant to execute the process of the court, and to return
" juries, yet, it is incident to their grant to do it, for other-
" wise they cannot hold a court."

The title (E) is as above, from which it appears that there are some things which are incident to every court; that even an inferior court may do those things necessary to the exercise of judicial power within its territorial limits; and it would follow that superior courts have, incidental to their existence, power to do all things necessary to their jurisdiction.

This brings us again to the particular question in controversy: What is the jurisdiction of the courts?

If it is to exercise the judicial power of Congress, (for so reads the case: " Congress has not delegated its judicial powers to its Courts; " 6 Wheat. 600), the subject is as intricate and perplexed as ever. If, however, we have made it clear that the courts are the people's courts, and exercise the judicial power of the United States, then they, as incident to their existence, hold, distributed among the system, complete power to afford a remedy for every violation of right, and complete protection or redress from every wrong,—just as the people could have done.

SECTION XV.

This brings us to the examination of the Judicial Acts of the United States.

Chapter 20, of the Act of 1789, passed Sept. 24, is entitled "An Act to establish the Judicial Courts of the United States."

This title seems to cover the whole United States, and the system intended by the Constitution.

The Act establishes and constitute both one supreme and tribunals inferior thereto.

Section 1, constitutes a supreme Court.

Sections 2 to 6, constitute tribunals inferior thereto.

Section 7 provides clerks; which completes the constitution of these courts; for we have seen that even a town court of a corporation, has inherent power to make a bailiff to execute its process and return juries.

Section 9 is either a grant of power or, it is not.

"The District Courts shall have, exclusively of the "courts of the several States, cognizance of all crimes, "and offences, cognizable under the authority of the Uni-"ted States, committed within their respective districts, or "upon the high seas, where no other punishment," than a small one, is inflicted.

This clause is but declaratory of the law, in excluding State Courts; for Congress cannot delegate the judicial

power of the United States to State Courts; nor could an offence, cognizable by the United States, in which the United States is a party plaintiff, be cognizable or punishable by the States.

The rest of this clause, and of the whole section, is distributive of the judicial powers of the United States, in all things, except in that which saves the common law remedy in every case where the common law is competent to give it. And the last clause, which provides that the trial of issues of fact in the District Courts, except civil causes in admiralty, shall be by jury.

The Constitutional provision is (Art. 3, Sec. 2, 3.):

"The trial of all crimes, except in cases of impeach-
"ment, shall be by jury; and such trials shall be held in
"the State where the said crimes shall have been com-
"mitted; but when not committed within any State, the
"trial shall be at such place or places, as the Congress
"may, by law, have directed."

Sec. 3, with this, directs the places of trial of crimes committed without the States.

This Section, (in accordance with the Constitution as above quoted, and the 7th amendment thereto,) merely declares the prior law. The parties were entitled to the jury trial, by the Constitution, and could not be divested of their right by express enactment, much less by silence.

Section 11, is also distributive. While Section 9 says, the District Courts shall have exclusive original cognizance of *all* civil causes in admiralty, this section distributes the judicial power of the United States in ALL *suits at common law or in equity*, and all crimes, except as otherwise provided for, to the Circuit Court.

Section 13 is mainly a bare re-enactment of Art. 3, Sec. 2, (2);—the last clause, however, regulates the appellate jurisdiction under the constitutional authority, found in the same article and section.

We, therefore, conclude that these sections are not a grant of power.

SECTION XVI.

The sections noted have constituted one supreme Court, and a system of courts inferior thereto.

The object and intent of this statute are made evident:

1st. By its title: an Act to establish THE judicial Courts of the United States,—not *some* Courts, but *the* Courts; —not the Courts of Congress, but the Courts of the United States.

2d. By the *res gestæ*;—The Constitution had placed a solemn and important power in the hands of Congress, to pass all laws necessary and proper for carrying into complete execution the judicial power of the United States, vested by it in the judicial department,—and Congress had accepted the duty. Full execution of this power was absolutely necessary to establish justice and secure the blessings of liberty, which include the rights of personal liberty, personal security, and private property. And it was of the very essence of civil liberty, that all these should find a complete and adequate remedy in courts of justice.

3d. A failure to perform all things necessary to the perfect working of this power, stultified the people, made Congress recreant to its obligations, and defeated the great design of its creation.

4th. The declaratory parts follow the Constitution, and indicate a desire and intention to carry out its powers.

5th. "The law favors liberty," and "favors a remedy."

6th. Statutes beneficial to the public shall be most liberally construed.

7th. Statutes, to carry out and make effectual a Constitutional enactment, shall be most liberally construed to that end.

In view of all these rules, yet, not forgetting that the words of the Act, if perfectly clear, are its only interperters, we come to enquire:—

1st. Whether this system of courts is capable of receiving the power to administer the whole judicial power of the United States? To this question, we believe the answer must be affirmative.

2d. Whether the power to grant the remedies in the case at bar, has been distributed to the Circuit Courts?

By Section 11, they have original cognizance of all suits of a civil nature, at common law or in equity, between the parties named, and it was enacted, 2 March, 1833, (Sec. 2, 4 Stat. 632.): The jurisdiction of the Circuit Courts of the United States, shall extend to all cases in law or equity arising under revenue laws of the United States, for which provisions are not already made.

(This Act was but declaratory of the existing law. *See Sec.* 15, *ante.*)

If the judicial power of the United States was ever actually vested in the system of courts, it can never be taken away from the system, without changing the Constitution.

SECTION XVII.

Chancellor Kent, in his Commentaries, vol. 1, p. 331 *et seq.* to 344, makes, I believe, as good and complete an argument as can be made upon that side of the question. He takes the reported opinions, admits the intricacies and difficulties which surround the position, assumes the decisions in *U. S.* v. *Hudson & Goodwin*, and *U. S.* v. *Coolidge*, to be the law; and attempts to justify it. In examing his argument, I believe that I shall answer all that counsel can say, or the court suggest, against my position.

The authority first cited is, *U. S.* v. *Worrall*, 2 Dallas 384 (Penn. Circuit), of which he says (p. 333): "This case "settled nothing, as the court were divided."

The next authority, *United States* v. *Burr*, (Va. Circuit), is little more satisfactory to that side of the question; for, while it ignores the constitutional question, and proceeds only under the statutory delegation, "it admits that, "when the Judiciary Act (S. 14) authorized the courts to "issue writs, not specially provided for by statute, but "which were agreeable *to the principles and usages of law*, "it referred to that generally recognized and long estab- "lished law, which formed the substratum of the laws of "every State."

Thus being, in fact, an authority for us, that Congress expressly recognized that the common law was the general, all prevading law of the land, not disparaged or in any respect denied by the Constitution.

The third case cited, is that of *U.* S. v. *Hudson & Goodwin;* which was not argued, was apparently but slightly examined, and was decided by a mere majority vote.

The fourth case, is that of *U. S.* v. *Coolidge*, (Mass. Circuit), 1 Gallison, 488, in which Judge Story, with less extended discussion than is usual for him, delivered an opinion of rare power, directly adverse to the preceding case, which opinion it is not necessary here to repeat, though the whole might well be here inserted as an argument. In this case the Judges were not divided, except in form, and to send the question again to the Supreme Court.

When this case reached the appellate court, it was not argued. Justice Story said that he did not understand that the case of Hudson & Goodwin had settled anything, —a position which was supported by Justice Washington, when he says, that, whenever the question shall be argued, he will divest himself of all prejudice occasioned by the former decision; and by Justice Livingston, who favored an argument.

This evident desire for an argument could not have existed, had the court been satisfied that the question had been fairly examined; and the only thing made clear by this case is, that the question was entirely unsettled. The case went upon a majority vote and the opinion was delivered by Justice Johnson, with an acumen and depth of reason, which compares unfavorably with the penetration and depth of a heavy dew. I speak this with all respect for the Court, and impressed with the evident lack of impression, created on the minds of other Justices, by his reasons assigned in the case of Hudson & Goodwin.

To this point, then, nothing had been decided; and our author (p. 338) was compelled to acknowledge, "that these "jarring opinions and decisions had not settled the general "question, as to the application and influence of the com-"mon law, upon clear and definite principles."

Our author (p. 339) then proceeds: "Mr. Du Ponceau, "in his dissertation on the nature and extent of the juris- "diction of the Courts of the United States, has ably ex- "amined the subject and shed strong light on this intricate "and perplexed branch of the national jurisprudence. He "pursues the distinction, and maintains that we have not, "under our federal government, any common law, con- "sidered as *a source of jurisdiction;* while on the other "hand, the common law, considered merely as the *means* "*or instrument* of exercising the jurisdiction conferred by "the Constitution and laws of the Union, does exist, and "forms a safe and beneficial system of national jurispru- "dence. The courts cannot derive their right to act, from "the common law. They must look for that right to the "Constitution and law of the United States. But, when "the general jurisdiction and authority is given, as in "cases of admirality and maritime jurisdiction, the *rules of* "*action*, under that jurisdiction, if not prescribed by "statute, may and must be taken from the common law, "if they are applicable, because they are necessary to give "effect to the jurisdiction."

Upon page 340, the author comments on the cases of Worrall and Hudson & Goodwin: "If such acts amount "to an offence against the United States, they must, of "course, be cognizable under its authority, and to the "jurisdiction of the Circuit Courts;" and proceeds (p. 341): "The Supreme Court of the United States, in *Robinson* v. "*Campbell* (3 Wheat., 212), went far towards the admis- "sion of the existence and application of the common law "to civil cases in the federal courts." And, after reciting the statute provisions, proceeds (p. 342): "Under these "provisions the court declared, that the remedies in the

" federal courts, at common law and in equity, were to be,
" not according to the practice of State courts, but ' accord-
" 'ing to the principles of common law and equity, as dis-
" 'tinguished and defined in that country, from which we
" 'derive our knowledge of those principles.'

" In this view of the subject, the common law may be cul-
" tivated as part of the jurisprudence of the United States.
" In its improved condition in England, and especially in
" its improved and varied condition in this country, under
" the benign influence of an expanded commerce, of en-
" lightened justice, of republican principles, and of sound
" philosophy, the common law has become a code of ma-
" tured ethics and enlarged civil wisdom, admirably adapt-
" ed to promote and secure the freedom, and happiness of
" social life.

" It has proved to be a system, replete with vigorous and
" healthy principles, eminently conducive to the growth
" of civil liberty; and it is, in no instance, disgraced by
" such a slavish political maxim as that, with which the
" Institutes of Justinian are introduced: *Quod principi*
" *placuit, legis habet vigorem.*" Inst. 1, 2, 6. It is the
" common jurisprudence of the United States, and was
" brought with them as colonists from England, and es-
" tablished here, *so far* as it was adapted to our institu-
" tions and circumstances. It was claimed by the Con-
" gress of the United Colonies, in 1774, as a branch of
" those ' indubitable rights and liberties, to which the res-
" 'pective colonies are entitled.' It fills up every inter-
" stice, and occupies a very wide space which the statute
" law cannot occupy. Its principles may be compared to
" the influence of the liberal arts and sciences. To use
" the words of the learned jurist, to whom I have already
" alluded, ' we live in the midst of the common law, we
" ' inhale it at every breath, imbibe it at every pore; we

" 'meet with it when we wake and when we lay down to
" 'sleep, when we travel and when we stay at home; and
" 'it is interwoven with the very idiom that we speak;
" 'and we cannot learn another system of laws without
" 'learning at the same time, another language.' "

SECTION XVIII.

In view of this quotation, the reason why Chancellor Kent regarded the question as "intricate and perplexed," is evident. He had assumed the opinion of Judge Johnson, in *U. S.* v. *Hudson & Goodwin*, to be the law, and is perplexed at the effect, a casual application of well known and well established principles, had upon the position taken.

Had he continued them to their logical result, all perplexity would have been removed, all intricacy would have vanished, and he would have seen that Du Ponceau's light, was only darkness.

This common law, claimed by the colonists as a part of those indubitable rights and liberties to which they were respectively entitled, which permeates and penetrates our every act, and surrounds us,—filling up every interstice,—which forms the substratum of the laws of every State,—forms the rules of action, if not prescribed by statute, under which the courts may, and must act, because these rules of action are necessary to give effect to the jurisdiction: Now, if the rule of action was prescribed by statute, it would, beyond question, be a law. Is it any less a law, because prescribed by another power? In both cases the courts declare what is the law, and enforce action in accordance with the rules so laid down by them.

It is necessary to give effect to their jurisdiction; that is, without it, they have no power to act; but by its aid they can act; and yet, he says it gives them no power to act.

From whence, then, do the Courts of Admiralty derive their power to act? The statutes creating them and, as this author assumes, giving them jurisdiction, give them no power to act; they cannot create a law, for that would be legislation. The legislature must either furnish the statutes, to give effect to their jurisdiction, or they must find other rules of action which they (not enacting) can declare to be the law, or they cannot act;—and this the Courts of Admiralty have done.—From whence comes the power, then, to act, to declare and enforce the common law? Not from statute; for, the statute is silent.

Where can "all" cases of law and equity be tried, but in the Courts of law, and Courts of Equity?

And where can suits at common law be tried by jury, except in Common law Courts?

And how can a fact be tried by jury, in the inferior Court, and re-examined in the Supreme Court, according to the rules of the Common law, if no such rules exist?

The Supreme Court has power to review all decisions of inferior courts, according to the rules of the common law, in all cases where no exceptions are made by Congress. The common law, then, is admitted to be the law, to some extent, dehors the statute, and to furnish the rules, by which the court shall proceed in all cases where the statute does not derogate from its power; and this, though the particular State, in which it is exercised, may never have admitted its force,—as in the States, where no Courts of Equity have ever been established.

This law is, by reference, in the Constitution confirmed; by it courts act; without it, or a substitute, they cannot act.

SECTION XIX.

How far does its power extend?

If a citizen of one State commits a wrong against a citizen of another State, or does any act whereby a cause of action at common law accrues, or if a vessel collides, or runs in debt, or becomes chargeable at common law,—suit may be brought; but what statute gives the courts jurisdiction of the cause of action,—or the right to examine into them, and say that the ship shall be charged, or, the defendant shall pay damages?

The statute says, they may issue all writs, necessary to their jurisdiction, and which are agreeable to the usages of law; but, what gives them jurisdiction of actions in case, or trespass, or assumpsit, or of libels?

The Constitution gives jurisdiction of parties but unless they get jurisdiction of the subject matter, from the common law, in all cases where the statute is silent,—I am at a loss to find its source, unless the jurisdiction of all cases of violation of right is inherent in the courts and exists in them, because they are courts, as a necessary constituent of their existence.

Whichever position is taken, the question is relieved of one of its most perplexing conditions, viz: that courts, deriving their only power and only jurisdiction from statutes, yet act on statutes, so imperfect, that the courts are compelled to add to them, words, which are not in them, to give them effect.

SECTION XX.

If we go one step farther, the system becomes harmonious: the two positions unite into one, and all perplexities and intricacies vanish; viz:

The common law, was, as affirmed by the congress of of the colonies in 1774, to be, a branch of those indubitable rights and liberties to which they were entitled; by it,—as containing the substratum of law, the permeating, penetrating, unalterable, and indubitable principles of justice and civil liberty—every man may claim, in courts of justice, of the judicial power a remedy for every violation of his rights;—this is of the very essence of civil liberty; therefore, if a man is deprived of his right to redress, he is deprived of civil liberty. Courts exist and act, within the boundaries of the English language, not to enforce the dictatorial and arbitrary commands of any power, because "*quod principi placuit, legis habet vigorem,*" but because, by the common law, as a necessary element of liberty, it is declared that, in courts of justice, for every right there shall be a remedy, and for every injury its proper redress, —an element existing before Magna Charta, affirmed by it, and so penetrating our system of jurisprudence and our very language, that we could not remove it from our system, without at the same time wiping out our language itself.

This common law (as has been well said) adapts itself to all circumstances, all states, and all times; by *its* principles all statutes must be construed; upon them all courts must act. Whatever be the form of the action, whatever the outward channels which legislatures may provide, the

substratum and foundation principles which require legislation itself, and control its construction, are found in it. It would, then, appear that the original source and fountain of the power of courts to act, is in this common law of justice; and the common law gives it to them, because they are tribunals for the administration of justice distributive, or, in common phrase, because they are courts of justice.

SECTION XXI.

Proceeding another step, we find that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

The division of government into departments was well understood,—their respective provinces were clearly defined: The legislative department could do what no other department could, namely, enact laws; but it could not adopt judicial functions, without going beyond legislation; and declaring the construction of laws, and applying them to particular cases, had long been committed to a separate department. Separate from either of the others, the executive department executed the laws, treaties and obligations of the nation. And the three departments—which were not as distinct in Britain as in the several States, where the line was generally drawn with great precision—made up a complete government. These were the departments of government.

These departments were again subdivided: the judicial into the grand subdivisions of law, equity and admiralty, each a department of the judicial department; the legislature into two houses of parliament, one of which only could originate a revenue law; the executive into the departments of state, war, finance, home, &c., each of which had its head, who was a minister, or servant to the chief executive.

SECTION XXII.

The meaning appears clear, when, in Art. 2, Sec. 2, (1), the President is authorized to require the opinion of the principal officer in each of the executive departments. And from the context of the next clause, it would not seem a forced construction to say, that the words "heads "of departments," as there mentioned, were intended to include the heads of the executive departments, which the preceding clause had treated as necessary ministers to the executive department of the government.

The provision of Art. 1, Sec. 8, (18), has nothing in its context to limit it to executive departments, but, in terms, refers to the combined whole: the Government of the United States, and the departments of that government.

The three divisions of the powers of government are clearly recognized by the three distinct articles. All legislative powers granted were vested in a department to be formed by election, and appointment of those who should exercise the power.

The executive powers were to be vested in another department, whose incumbent was not then elected. The judicial power of the United States was to be vested in another department.

Each department was a system, which, together, could execute all the powers committed to it. And the section before us treats those powers as vested in those departments, or systems, by the Constitution.

SECTION XXIII.

Had not the position been so many times slurred over, evaded and never fairly met, it would seem an indubitable proposition that—when the people said the judicial power of the United States shall be vested in a system or department, and treated the powers, granted by the Constitution, as vested powers,—that it conveyed to that department everything which could be included in the name.

Had Congress enacted a law like this: The highest court of judicature in the United States shall be called the Court of Ambassadors and for the correction of errors, and shall consist of nine judges, etc; and the inferior courts of the United States shall be called the courts of the people's bench, and shall consist of nine judges, etc.; all of which judges, and other officers, shall be appointed forthwith by the President, with the advice and consent of the senate, and shall immediately enter upon their respective offices; and such courts shall exercise the powers, and have the jurisdiction, vested in them by the Constitution, and no others,—would it for a moment have been doubted that the inferior courts took their power directly from a constitutional grant?

SECTION XXIV.

Inspection of the original Constitution will show that all nouns were commenced with capital letters, as was the custom of the times; but the word "supreme" is not so commenced, while "court" is commenced with the capital. And again, "inferior" is written like "supreme," with a small letter; but "courts" is commenced with the capital. The care with which the instrument was prepared in every part, even to punctuation, makes the presumption very strong that the word supreme was writted as an adjective, meaning "*highest in authority;*" and this becomes more apparent by the illustration above; for *by whatever name Congress might have designated it, when it was constituted, it would, if highest in authority, have been held to be the appellate court, designated in the Constitution.*

Again: Inspection shows that the word "in" recurs before "inferior courts": The judicial power of the United States, shall be vested *in* one supreme Court, and *in* such inferior Courts. Where is there any distinction in the grants of judicial power, or any difference in the action of the Constitution toward them?

The judges of both are provided with the same security in office, and compensation; and, in the one highest Court, *and in* the inferior Courts, the judicial power of the United States,—extending to all cases in law and equity, arising as stated, and to all cases in admiralty, and to the parties named,—shall be vested. Jurisdiction of the parties and subject matter, appear by this to be granted.

SECTION XXV.

Again: It appears that the power, mentioned in the first three articles of the Constitution, was granted, subject to no conditions, and vested by virtue of the grant, or else, the grant was utterly inoperative.

This word "vest"—: "to give an immediate fixed right "of present or future enjoyment"—, thrice used in the Constitution, has a peculiar significance.

The highest Court, and the inferior Courts, were all left to Congress to constitute, ordain, and establish; and when the Supreme Court and Circuit and District Courts were constituted, they existed as one highest and many inferior courts. Then, the grant took effect, the judicial power was vested, an immediate fixed right to present or future enjoyment of the judicial power of the United States, accrued to the highest and inferior courts.

The appellate jurisdiction, subject to exceptions by Congress, accrued to the highest court, and the original jurisdiction, subject to no exception, accrued to the inferior courts.

This instrument, being beneficial and conducive to liberty, shall be most liberally construed; and the whole judicial power must be intended. Yet, the whole cannot vest in the highest and in the inferior courts, where original jurisdiction is expressly excepted from the highest,—unless there is the same grant of original jurisdiction to the inferior, that there is of appellate jurisdiction to the highest court. Nor can the Constitution operate to convey the judicial power, the legislative or executive powers, unless the first President, upon election and qualification,—the first Congress, upon election and appointment,—the first Courts, upon constitution and establishment, had an immediate and fixed right of present enjoyment of the executive, legislative and judicial powers, respectively.

SECTION XXVI.

The manner, in which the remarks of the court, in *Wheaton et al.* v. *Peters et al.* 8 Peters, 591, have been presented in the digests, and in the note to Kent's Commentaries, above considered, requires a passing examination:

The case was one of copy-right; and on page 654, the court says: "The complainants assert their rights on two grounds:

"First, under the common law;

"Secondly, under the Acts of Congress."

Upon the first point cases are carefully examined, and the court sums them up (p. 657) in this manner:

"From the above authorities and others, which might "be referred to, if time permitted, the law appears to be "well settled in England, that, since the statute of 8th "Anne, the literary property of an Author, in his works, "can only be asserted under the statute; and that—not- "withstanding the opinion of a majority of the judges, in "the great case of *Miller* v. *Taylor*, was in favor of the "common law right before the statute,—it is still consid- "ered in England as a question, by no means free from "doubt."

The opinion then proceeds to show that, in justice and right, as a matter of common law, the author, after he had published his work to the world, has no common law property in it: and proves the position, by comparing the case with that of the inventor, who makes and vends a useful machine. "Does the common law give a perpetual

" right to the author, and withhold it from the inventor?
" And yet, it has never been pretended, that the latter
" could hold, by the common law, any property in his in-
" vention, after he had sold it publicly."

The opinion then proceeds, as follows (p. 658): " That
" every man is entitled to the fruits of his own labor, must
" be admitted; but he can enjoy them only (except by
" statutory provision) under the rules of property which
" regulate society, and which define the rights of things
" in general.

" But, if the common law right of authors were shown
" to exist in England, does the same right exist, and to the
" same extent, in this country?

" It is clear, there can be no common law of the United
" States. The federal government is composed of twenty-
" four sovereign and independent States, each of which
" may have its local usages, customs and common law.
" There is no principle, which pervades the union, and has
" the authority of law, that is not embodied in the con-
" stitution, or laws of the union. The common law could
" be made a part of our federal system, only by legislative
" adoption.

" When, therefore, a common law right is asserted, we
" must look to the State in which the controversy origina-
" ted. And, in the case under consideration, as the copy-
" right was entered in the clerk's office of the District
" Court of Pennsylvania, for the first volume of the book
" in controversy, and it was published in that State; we
" may inquire, whether the common law, as to copyrights,
" if any existed, was adopted in Pennsylvania.

" It is insisted, that our ancestors, when they migrated
" to this country, brought with them the English common
" law, as part of their heritage.

"That this was the case, to a limited extent, is admitted. "None will contend, that the common law, as it existed "in England, has ever been in force, in all its provisions, "in any State of this Union. It was adopted, so far only "as its principles were suited to the condition of the colo- "nies; and from this circumstance we see, what is com- "mon law in one State, is not so considered in another. "The judicial decisions, the usages and customs of the "respective States, must determine, how far the common "law has been introduced and sanctioned in each."

It is then shown that a common law copy-right did not exist in Pennsylvania, and it proceeds, page 660: "but there is another view, still more conclusive."

And this was on the constitutional provision and statutes under it; by which it appears, that, when it was proposed to secure, for a limited time, the exclusive right,—the common law perpetual right, if any existed, was ignored by the people. And the Acts of Congress under the Constitution, "instead of sanctioning an existing right, created it." And so much of the case as it is necessary here to consider, concludes (p. 663): "This right, as has been "shown, does not exist at common law;—it originated, if "at all, under the Acts of Congress."

As some of the sentences, above quoted, appear in the digests, and in the reporter's notes at the head of the case, isolated from all facts, they seem as the enunciation of a weighty principle, pregnant with meaning; for instance, this remark: "It is clear there can be no common law of the United States." Yet, just before this, we find allusion to the common law, in this sentence: "That every "man is entitled to the fruits of his own labor, must be "admitted; but he can enjoy them only (except by statu- "tory provision) under the rules of property which regu-

"late society, and which define the rights of things in "general."

The remarks are all correct enough, in connection with questionable property. In one State the author might have had complete protection from the courts, on the basis that he had a complete property in his works, while another might have refused it altogether, and decided that he had no property in it. Men were bought and sold in Carolina, while, voluntarily taking them into New York, made them free.

Things, benificent and valuable in one climate, are in another noxious. But this illustration develops the principle, and shows that those who took the remark of the court as an isolated or abstract statement, that there could be no common law, mistook its meaning.

Articles of food and value become noxious from change in surrounding circumstances.

Physicians, who have been among great epidemics, give accounts of many things, which have been valuable, becoming the agents for the spread of the malady, and divested of all value, and their destruction absolutely neces sary, and again being restored to harmlessness and value, —and all this, without any change, whatever, in the article itself.

Upon this we might say that there can be no common law of any State.

The intention of the court is made clear by the context, and the expression means that, as to questionable property, there can be no law common to all the States; each State may have its local usages, customs and common law.

And the court affirms our assertion that the rules of property which regulate society, and define the rights of

things in general, exist as principles, which prevade the Union with the authority of law; are embodied in and form the foundation of the Constitution, expressly recognized by the provisions, that no man shall be deprived of life, liberty or property, but by the judgment of his peers or the law of the land; and, the enumeration of certain rights, shall not be construed to deny or disparage others, retained by the people.

If the abstract statement is true, that there is no common law of the United States, because the States, each, have their local usages, customs and common law; it is also true that there was no common law of England, when Blackstone wrote, because England was made up of municipal corporations, counties, and other divisions, each of which had their local usages, customs and common law. Rigid uniformity of rules never was a characteristic of the common law as to matters which could be the subject of local law, or custom; but its fundamental principles, which regulate society and define the rights of things in general, governed throughout the whole domain of the common law; enforced the rights, acquired by every local usage or custom; protected life, liberty and property; gave a remedy for every violation of right,—and, even as to customs themselves, declared, in more than one case, that no usage, however ancient, could justify a custom, bad in itself.

Money v. *Leach*, 3 Burrows, 1743.

The common law is not a code of arbitrary enactments, but consists of principles of justice, which are illustrated, and ascertained in their application to myriads of individual cases, by courts of justice, and which are, as we have seen, ample to adapt themselves to, and protect persons and property, among the diverse local usages and customs of England, and form the substratum and foundation of our Constitution itself.

SECTION XXVII.

In all cases, where there is a legal right to justice, but for which right the law has not provided any specific legal remedy, a remedy is dispensed by the judicial power of the State, either by mandate, commanding, or injunction, forbidding.

Tapping on Mandamus, (Marginal p. 3.)
Rex v. *Dublin*, 8 Mod., 29.

"It seems unquestionable that a right of action for "damages generally exists against public officers, who re- "fuse or neglect to perform their duty, in favor of those "persons whose rights are injuriously affected by such "neglect of duty. *But this remedy by action against "the officers, is of such doubtful and uncertain character*, as "not to supersede that by mandamus. The unliquidated "damages, to be assessed by a jury, would not necessarily "be the amount due the party." (*The People* v. *Mead*, 24 N. Y., 120. *Ex parte Lynch*, 2 Hill, 45. *Strong, petitioner*, 20 Pick., 497.)

The court cannot shut its eyes to the fact that all this plaintiff could get, at the end of a suit for damages against the officers (who would be backed, in their entire suit, by the United States, which furnishes them counsel in this case), would be utterly inadequate to repair his damages; and, besides, they are alleged in the bill, to be insolvent.

SECTION XXVIII.

From the case of *Marbury* v. *Madison*, 1 Cranch, 137, we gather principles of law—decided by this court within 14 years after the enactment of the Constitution,—which are decisive, both as to the power of the Circuit Court to compel ministerial officers, by mandamus, and also as to the power of that court to restrain the officers from collecting the tax, wrongfully imposed. Read, in view of the object and design of the Constitution, to establish justice and secure liberty, the positions taken by the court, in that case, are impregnable. It says, upon the application for mandamus (p. 162): "This brings us to the second enquiry, which is: If plaintiff has a right, and that right "has been violated, do the laws of his country afford him "a remedy?"

(p. 163): "The very essence of civil liberty certainly "consists in the right of every individual to claim the pro- "tection of the laws, whenever he receives an injury. "One of the first duties of government is to afford that "protection." * * *

"In the third volume of his commentaries, *page* 23, "*Blackstone* states two cases in which a remedy is afforded "by mere operation of law. 'In all other cases,' he says, "'it is a general and indisputable rule, that where there is "'a legal right, there is also a legal remedy, by suit or ac- "'tion at law, whenever that right is invaded.'

"And afterwards, page 109 of the same volume, he says: "'I am next to consider such injuries as are cognizable "'by the courts of common law. And herein I shall, for

" 'the present, only remark, that all possible injuries, what-
" 'soever, that did not fall within the exclusive cognizance
" 'of either the ecclesiastical, military, or maritime tri-
" 'bunals, are, for that very reason, within the cognizance
" 'of the common law courts of justice (legal and equita-
" 'ble); for, it is a settled and invariable principle in the
" 'laws of England, that every right, when withheld, must
" 'have a remedy, and every injury its proper redress.'

" The Government of the United States has been em-
" phatically termed a government of laws, and not of
" men. It will certainly cease to deserve this high ap-
" pellation, if the laws furnish no remedy for the violation
" of a vested legal right.

" If this obloquy is to be cast on the jurisprudence of
" our country, it must arise from the peculiar circum-
" stances of the case.

" It behooves us, then, to enquire, whether there be, in
" its composition, any ingredient which shall exempt it
" from legal investigation, or exclude the injured party
" from redress." * *)p. 164): " Is it to be contended
" that the heads of departments are not amenable to the
" laws of their country?" * * * *

(p. 166): " The conclusion from our reasoning is that,
" where the heads of departments are the political or confi-
" dential agents of the executive, merely to execute the
" will of the President, or rather, to act in cases in which
" the executive possesses a constitutional or legal discre-
" tion,—nothing can be more perfectly clear, than that their
" acts are only politically examinable. But where a
" specific duty is assigned by law, and individual rights
" depend upon the performance of that duty, it seems
" equally clear that the individual, who considers himself

" injured, has a right to resort to the laws of his country " for a remedy." * * *

(p. 168): " It remains to be enquired, whether he is " entitled to the remedy for which he applies. This de- " pends on:

" (1.) The nature of the writ applied for, and

" (2.) The power of this court.

" 1. The nature of the writ:

" Blackstone, in the third volume of his commentaries, " page 110, defines a mandamus to be 'a command, issu- " 'ing in the king's name from the Court of King's Bench, " 'and directed to any person, corporation, or inferior " 'court of judicature, within the king's dominions, requir- " 'ing them to do some particular thing therein specified, " 'which appertains to their office or duty, and which the " 'Court of King's Bench has previously determined, or at " 'least supposes to be consonant to right and justice.'

" Lord MANSFIELD, in 3 *Burrows*, 1266, in the case of " *The King* v. *Baker et al*, states, with much precision and " explicitness, the cases in which this writ may be used. " 'Whenever,' says that very able judge, 'there is a right " 'to execute an office, perform a service, or exercise a " 'franchise (more especially if it be in a matter of public " 'concern, or attended with profit), and a person is kept out " 'of possession, or dispossessed of such right, and has no " 'other specific legal remedy, this court ought to assist by " 'mandamus, upon reasons of justice, as the writ ex- " 'presses, and upon reasons of public policy, to preserve " 'peace, order, and good government.' In the same case, " he says: 'This writ ought to be used upon all occa- " 'sions where the law has established no specific remedy,

" 'and where, in justice and good government, there ought
" 'to be one.' These circumstances, certainly, concur in
" this case."

In 1793, the Attorney General and Secretary of War, deemed a mandamus, directed to the head of a department, to be the most proper mode of trying a claim to a similar legal right, and (p. 172) " when the subject was " brought before the court, the decision was not, that a " mandamus would not lie to the head of a department, " directing him to perform an act, enjoined by law, in the " performance of which a person had a vested interest; " but, that a mandamus ought not to issue in that case,— " the decision, necessary to be made, if the applicant had " not the legal right.

" The Judgment in that case is understood to have de-
" cided the merits of all claims of that description.

" The doctrine, therefore, now advanced, is by no means " a novel one. It is true that the mandamus, now moved " for, is not for the performance of an act, expressly en- " joined by statute." * * *

" This, then, is a plain case of mandamus, either to de- " liver the commission, or a copy of it from the record; " and it only remains to be enquired, whether it can issue " from this court.

" The Constitution vests the whole judicial power of the " United States in one supreme Court, and such inferior " Courts as Congress shall, from time to time, ordain and " establish. This power is expressly extended to all cases, " arising under the laws of the United States, *and conse-* " *quently, in some form, may be exercised over the present* " *case, because the right, claimed, is given by a law of the* " *the United States.*

"In the *distribution of this power* it is declared that, "'the supreme Court shall have original jurisdiction in all "'cases affecting ambassadors, other public ministers and "'consuls, and those in which a State shall be a party. "'In all other cases, the Supreme Court shall have appel- "'late jurisdiction.'"

* * * (p. 175): "The plain import of the words "seems to be that, in one class of cases its jurisdiction is "original, and not appellate; in the other it is appellate, "and not original." * * "To enable this Court, then, "to issue a mandamus, it must be shown to be an exercise of "appellate jurisdiction, or to be necessary to enable it to "exercise appellate jurisdiction."

SECTION XXIX.

Had the Circuit Court the power to issue the writ?

The reply of *Marbury* v. *Madison*, is affirmative.

"*This power, in some form, may be exercised over the "present case, because the right, claimed, arises under the "law of the United States*;" and the right to a legal remedy, by suit or action at law, wherever a right is invaded, is reserved to the people, and not disparaged by the Constitution.

The whole judicial power of the United States is vested in the supreme Court, and in such inferior Courts as Congress has established.

In the distribution of power, this power is given to the courts of original jurisdiction. The supreme Court, in this instance, is not a court of original jurisdiction; the Circuit Court is.

The power exists, may be exercised, is vested somewhere. It is not vested in any but the Circuit Court; therefore it must exist in, and may be exercised by it.

SECTION XXX.

In the light of *Marbury* v. *Madison*, and tried by its principles, the case seems clear; but the case of *McIntire* v. *Wood*, 7 Cranch, 504, at page 506, overruled *Gilchrist* v. *The Collector of Charleston*, cited ante, and with the case of *McClung* v. *Silliman*, 6 Wheaton, 598, seems to place the power of the courts in the hands of Congress.

We will pass all cases where a mandamus to inferior Courts is granted or refused under particular statutes, and all which were based only on these two decisions; for, these being the foundation, all others must stand or fall with them.

It is to be noted that the closing language of the opinion in *McClung* v. *Silliman*, p. 605, and the decision of the case, is, "that all violations of private right, resulting from "the acts of such officers, should be the subject of actions "for damages, or to recover the specific property, in courts "of competent jurisdiction. That is, parties should be "referred to the ordinary mode of obtaining justice, in-"stead of resorting to the extraordinary and unprecedented "mode of trying such questions on a motion for a man-"damus."

Both of these cases arose upon the same facts, and were the same case, presented in different forms. In *McIntire* v. *Wood*, the plaintiff had paid to the defendant, as receiver of the land office, the price of a piece of land, and demanded that he issue to him a final certificate of the purchase of the land; which the defendant refused, because, another had been issued to a different person, through

some mistake, growing out of the irregular form of the tracts along the river. And, in *McClung* v. *Silliman*, it appears that McIntire had assigned his receipts to McClung, a resident of another State, and that Silliman had become the receiver of the land office, as successor of Wood.

Upon this state of facts, it appears that the plaintiff had a full, perfect and adequate remedy at law for his injury. He was entitled, either to recover his money, with damages for its detention, or the value of the land at the time of his demand.

And in Chancery, the receiver could have been restrained, by injunction, from doing any act, which would prejudice the plaintiff's rights, and compelled, by decree, to do any act, yet remaining in his power, which the plaintiff might claim as a right. And these remedies would appear in every case, of the same sort, to be sufficient.

SECTION XXXI.

If this is true, then the question, upon which the Circuit Court were divided, viz.: "Whether that court had "power to issue a writ of mandamus to the register of the "land office in Ohio, commanding him to issue a final cer- "tificate of purchase to the plaintiff for certain lands in "that State"—was correctly decided in both cases: because a mandamus is not a proper remedy; and courts have not the power to grant it in cases, where a full and perfect remedy exists in the ordinary modes of administering justice, unless the statute has added it to the ordinary modes. In going any further than that, in either case, the court had to travel out of the record. The decision in the first case was: "that the Circuit Court did not possess the "power to issue the mandamus moved for" (6 Wheaton, 601); and the syllabus to the second case is (*id. p.* 598): "A State Court cannot issue a mandamus to an officer of the United States." And this is the only point which the court does not, in the opinion, profess to have decided in the former case.

SECTION XXXII.

But these two cases profess to go farther; and we will follow their language, and weigh it, almost by syllables; for it concerns a matter of grave import, on whose ultimate decision rests the very structure of our government, and the Constitutional guaranties of our liberties.

If the theory of these two opinions is correct, the judicial power of the United States is vested and rests in Congress, subject to its delegation and retraction.

If, on the other hand, the theory upon which much of our argument has been based, is true, the *whole judicial power* of the United States is vested in the courts,—*the great power*, which the King, as sovereign, exercised, sitting upon his bench in person, or, in judgment of law, being, in all his courts of justice, ever present and repeating the words of *Magna Charta*: "*Nulli vendemus*," &c.: We will neither sell, deny, nor delay justice to any man,—for every right there is a remedy. This was certainly a judicial power: It made no law, therefore it did not legislate; it simply decided what was the law before, what wrong existed in violation of that law, and adjudged and decreed a remedy for the wrong.

It cannot be contended that the people, as the sovereign and source of all power, successors to the King, as sovereign and source of all power, did not succeed to, and do not possess the power to grant, and not deny justice; they either possess it in their aggregate capacity as a nation's sovereign, or they have vested it somewhere.

If it is part of their judicial power, as it was of the King, they have vested it in the Courts of Justice.

If the Common law, and the right to protection and redress of wrongs, still exists in every citizen, undisparaged ; if the change of sovreigns has not taken away our right to the sovreign's protection, for which we joined society, and to which the Kings so fully and repeatedly pledged themselves in solemn compacts,—then their successors, the people, are in their courts of justice, ever present and repeating the words: "We will not sell, neither defer nor deny justice to any man,—for every wrong there shall be a remedy."

SECTION XXXIII.

By the Constitution, the judicial power of the United States is vested in one supreme Court, &c.

The judicial power extends to all cases in law and equity, arising under the Constitution and the laws of the United States;—in all cases affecting ambassadors and other public ministers and consuls, the supreme Court shall have original jurisdiction.

In suits at common law * * * the right of trial by jury, shall be preserved.

Appointment invests the appointee with the powers of an office, but it does not vest any power in the office itself.

Until the judges of the supreme Court were appointed, the powers of the court remained in abeyance, for want of an instrument to execute them. When the office was filled, and the instrument was provided for executing the powers, they became active; and, had Congress never passed a single statute relating to the practice, can it be doubted, that ambassadors, ministers and consuls, could have demanded a remedy for wrongs, and that the court could have adopted, from the common law, process and forms of proceeding, or even have framed original writs and remedies, necessary to the exercise of its jurisdiction?

SECTION XXXIV.

But what are "cases"? Are they not instances where it is alleged that the law has been transgressed, or right violated, and a remedy is prayed?

Irvine v. *Marshall*, 20 *How.*, 564.

And what is jurisdiction, but the right or power to say the law?

Our legal words were originally spoken in Latin; and often their clearest meaning is obtained by resolving them back into their original form:—juris–diction: speaking the law. Jurisdiction of these cases, then, involves the power to speak (1st) the right, (2d) whether it has been violated by the accused, defendant, or not, (3d) the remedy, and (4th) to make the remedy effectual.

The remedy and its effectuation is as much a part of the law, as the right.

Wayman v. *Southard*, 10 Wheat., p. 23.

Juris–diction, to the 4th division of its acts, is not necessarily judicial power; it only becomes power when it compels all things necessary to its perfect exercise and complete execution.

SECTION XXXV.

The relation of the legislature to judicial power, is illustrated by the appointment to judicial office.

The power exists outside and independent of legislative action. The legislature may, however, prescribe channels in which it shall run: forms, process, every exterior provision, provided they leave intact the power itself.

But, as the legislature cannot destroy the power, or any part of it, or suspend it, or take it away by direct action it follows that it cannot do it indirectly, by providing insufficient channels for its exercise. And the possessor of the judicial power of the United States, must have, inherent in the power itself, the means of constant, active existence, and complete juris–diction, either by the assistance of, or independent of, the legislature.—To be power, it must always be able to decide what is the law, what wrong exists in violation of that law, and to adjudge and decree a remedy for the wrong.

SECTION XXXVI.

In this view, the language of the opinion in *McIntire* v. *Wood*, is not diverse from our doctrine, *i. e.*: "We are of "the opinion, that the power of the Circuit Courts to issue "the writ of mandamus, is confined exclusively to those "cases in which it may be necessary to the exercise of "their jurisdiction."—If their judicial power of jurisdiction extends to deciding what is the law, what wrong exists in violation of that law, and to adjudging and decreeing a remedy for the wrong,—then they may issue this, or some parallel writ, as absolutely necessary to this juris-diction, in all cases where there is no other substantial and sufficient remedy.

SECTION XXXVII.

Beyond this we cannot go with this opinion; it proceeds: "But, although the judicial power of the United "States extends to cases arising under the laws of "the United States, the legislature have not thought "proper to delegate the exercise of that power to its Cir- "cuit Courts, except in certain specified cases."

"Its Circuit Courts"—Whose? If the inferior Courts belong to Congress, the Congress can abolish them, and the Constitution made a mistake in enacting that the Judges shall hold their offices during good behavior, and intended, notwithstanding the clear and careful wording of this Section, to say: "during the pleasure of Congress, or "while Congress shall continue their offices."

It is evident, however, from the whole Constitution, that, in its enactment, the people intended to institute a complete judicial system, adequate to all the wants of a growing nation; but no more intended to give to Congress the power to abolish it, than to abolish the Executive department.

SECTION XXXVIII.

The judicial power of the United States existed before the number of the Judges of the Supreme Court was established, or even the Court was created, or the inferior Courts, the channels for its exercise, were ordained.—The power itself existed, and was an office;—Congress created, appointed and ordained a corporation to receive the vesture and powers of the office, and the President appoints and commissions a man, investing him, in turn, with the power.—After Congress ordains and establishes a Court, it exists, in abeyance, though no Judge or instrument is provided to invest himself in it and execute its powers;—and so the judicial powers were ready to invest the Courts, when Courts should be provided to don the vestments.

If, in such provision, Congress delegated "their" judicial power to the Courts, then the President delegates his judicial power to the Judges when he commissions them.

The Constitution (Art. 1, S. 8, 18,) treats the powers as "vested by this Constitution," not only in the Government of the United States, but also proceeds: "*or any department or officer thereof.*" The Senate and House of Representatives are treated in the aggregate, only. No officers, save the President, and "the Judges of *both the supreme* "*and inferior* Courts" (Art. 3, S. 1.) are mentioned in the Constitution as such; and, as to the Judges, it it provided, that they shall hold their offices during good behavior, and shall receive, at stated times, the compensation undiminished.

It is a necessary sequence that it was the intent of the makers of the Constitution, to vest, *by its grant*, in the

President and in the judicial officers, the powers of their several offices whenever they should be designated or appointed by the person, or department, to whom the power of appointment was given; and did not, in conferring the power of creation or ordination, confer any power over the appointee by implication.—The authority to distribute judicial powers must be sought, and can only be found in the clause, authorizing all laws necessary and proper to carry the powers vested, into effect.

SECTION XXXIX.

Returning to the text of the opinion, we find the whole decision stated again in *McClung* v. *Silliman*, 6 Wheat., p. 600: "Though this power would follow from vesting in "its courts the whole judicial power of the United States, "the argument fails here, since the legislature has only "made a partial delegation of its judicial powers to the "Circuit Court;"—and p. 604: "But when, in the cases "of *Marbury* v. *Madison*, and that of *McIntire* v. *Wood*, "this Court decided against the exercise of that power, "the idea never presented itself to any one, that it was "not within the scope of the judicial powers of the United "States."

The opinions speak of the legislature and "its courts," and "its judicial powers."

Upon the question in Hayburn's case, it was decided that, all legislative powers of the United States were not granted to Congress, that the people exercised a large part of them, and reserved that portion to themselves; therefore, the people, in enacting that fundamental law, were a legislature; and if they did not delegate or grant their judicial power to the Courts or to Congress, then none of them can be exercised or granted by either.

SECTION XL.

We look in vain for any grant of judicial power to Congress, or any authority to grant; for, *a power to appoint is not a power to convey.*

A, conveys or devises property to such person as B shall by deed appoint, and B names C, and executes the deed of appointment; B conveys nothing, but C is invested with the title by the conveyance or devise of A.

We find: "The Congress shall have power to constitute tribunals inferior to the supreme Court," and: "The judicial power of the United States shall be vested "in one supreme Court and in such inferior courts as "the Congress may, from time to time, ordain and establish."

This is very like a deed or devise to one whom another shall appoint.—Congress may constitute, and shall ordain and establish.

Constitute: To give formal existence to.

Ordain: To establish in a particular office or order."

Establish: To set and fix firmly or unalterably; to form permanently.

Congress, then, had power to give formal existence to the circuit Courts, to establish them in the office and as the instruments of judicial power, and set and fix them unalterably therein.

If the grant of the people could operate directly to convey the judicial power to inferior tribunals, to which Congress might give formal existence, then it was not necessary, to carry this constitution or appointment of the inferior tribunal into effect, that Congress should grant any such power to them, and, not being necessary, Congress has not the power to do it.

SECTION XLI.

It was evidently the intention of the people to leave to Congress the number of Judges of the supreme Court, so that a sufficient number might always be provided, and to leave also the territorial jurisdiction of inferior courts, the establishment of courts of record, and courts inferior to courts of record, for examinations and minor causes; but themselves granted directly to any and all such, the judicial powers of the United States, in order to establish justice, that is, to fix it, firmly and unalterably, and to secure liberty.

SECTION XLII.

"The very essence of civil liberty certainly consists in "the right of every individual to claim the protection of "the laws, whenever he receives an injury." (*Marbury* v. *Madison*, 1 Cr., 163.) Is the obloquy to be cast on the Constitution, which was enacted to secure liberty, that the laws it established, furnish no remedy for the violation of a vested legal right? If it is true, then the Constitution did not establish justice; and the attempt was a hideous abortion, a complete failure; the essence of civil liberty does not permeate the system it inaugurated, and all that we may say of our birth-right in the land of the free,—our inheritance from the mother country, baptized and purified in blood, and preserved and held aloft as the beacon light to a dark and down-trodden world,—all that we may have claimed, of justice established and liberty secured,—are false, glittering generalities, which will not bear the test of particular application: We have the form without the substance, the name, without the spirit essential to give it worth or meaning.

SECTION XLIII.

The object of the Act, is a proper criterion to judge of its intention, if the words are at all ambiguous.

Which would secure liberty and establish justice most certainly?—to place its very essence unalterably in the keeping of the department, which was called into being for the purpose of exercising its powers,—or to place it in the hands of a department, which must, from the very necessities of its position, be cut off from the examination or knowledge of individual cases of wrong, to be doled out or withdrawn by that department as it may deem expedient?

SECTION XLIV.

This brings us to the distinction between the powers of the two departments: Legislation must settle questions of expediency, and act in relation to them;—but Justice can know no expediency; it can, as each case presents itself, only decide what is the law, which is, as Lord Coke has it, "the true and right line, wherein all justice distributive is guided," and in that right line must enforce the remedy in each individual case, wherever there is a right.

SECTION XLV.

We now return to the original law laid down in *Marbury* v. *Madison*, and find the principle again repeated in *Kendall* v. *the United States*, 12 Peters, 524, at page 624: "The power to enforce the performance of the act must "rest somewhere, or it will present a case, which has often "been said to involve a monstrous absurdity, in a well "organized government,—that there should be no remedy, "although a clear and undeniable right should be shown "to exist."—It may be shown that an argument from absurdity, is precisely that, attempted to sustain the opinion in *McClung* v. *Silliman*, 6 Wheat. 603; and we may use the argument against the power of that case, freely, because, adopting it, the Court then admitted the soundness of its foundation as used in the other cases.

The decision in *Marbury* v. *Madison*, is, that there was nothing in the case to exempt the question from legal examination or exclude the injured party from legal redress, —and (page 173): "This, then, is a plain case for a man- "damus," * * * "and it only remains to be enquired, "whether it can issue from *this* court. The Constitution "vests the *whole* judicial power of the United States in "one supreme Court, *and* such inferior Courts as Con- "gress may, from time to time, ordain and establish."

Compare with this language, the opinion in *McClung* v. *Silliman*, 6 Wheat., at p. 600: "Though the power would "follow from vesting in its courts *the whole* judicial power "of the United States, the argument fails here, since the "legislature has only made a partial delegation of its ju-

" dicial powers to Circuit Courts." And we find that the two cases are totally inconsistent.

Marbury v. *Madison* holds that the Constitution vests the *whole* judicial power of the United States, in one supreme Court and in the inferior Courts,—that the Constitution forbade the Supreme Court to exercise original jurisdiction in such cases, and vested it in the inferior Courts.

McClung v. *Silliman*, and *McIntire* v. *Wood*, hold that the Constitution does not vest the judicial power of the United States in one supreme Court and in the inferior Courts,—but, that both obtain their judicial power in all cases, not affecting ambassadors, other public ministers and consuls, from the grant of Congress, and have no power except that which Congress has granted and may retract. The Supreme Court cannot re-examine anything, which has not come within the cognizance of the inferior Courts; therefore, judicial power over all cases, except those of ministers and States, is completely at its mercy.

SECTION XLVI.

One case says, the courts have received the whole power; the other opinion says, they have not. Which is the law?

Is it the "monstrous absurdity," that in this so-called free government, there is no remedy, although a clear and undeniable right is shown to exist?

Was Britain more free under the Magna Charta and compact with her King, in the twelfth century, than the United States under her Constitution?

Was justice better established and liberty more secure in England, when Blackstone wrote:—"It is a general "and indisputable rule, that where there is a legal right, "there is also a legal remedy by suit or action at law, "whenever that right is invaded," * * * "for it is a "settled and invariable principle in the laws of England, "that every right must have a remedy, and every injury "its proper redress by suit or action at law,"—than in America to-day?

Or were the courts of justice invested by the Constitution with the whole judicial power of the United States, and so empowered that every individual can have a legal remedy therein for every legal right?

SECTION XLVII.

Article 1 of the Constitution provides that "all legisla- "tive powers, herein granted, shall be vested in a Congress "of the United States, which shall consist of a Senate and "House of Representatives. The House of Representa- "tives shall be composed of members, chosen every second "year, by the people of the several States.

"The Senate shall be composed of two Senators from "each State, to be chosen by the legislature thereof."

There was no Congress till the members were chosen. The people of the several States could not severally delegate to their representatives, the power to rule the whole people; nor could the legislature of the several States, severally, delegate any power to control the Nation.

"The legislative powers" herein granted' "were granted to, and, when Congress came into existence, vested in Congress by direct action of the Constitution. It is the grant of the whole people to the appointees of the several divisions.

Again:

The Executive power shall be vested in a President, to be chosen by electors, appointed by the several States, except that, in a certain contingency, the choice shall be made by the House of Representatives. The grant of Executive power is direct to the person appointed by electors, or, in default of such appointment, to the person appointed by another.

In case of removal, &c., of the President, the powers

shall devolve on the Vice President, and Congress may designate the officer who shall act, in case both are disabled. Till the disability of the President, neither of these other officers would have any power; therefore it is plain, that neither the Electors, nor Congress, granted any power to them; but when the contingency happens which makes the individual, President, he is invested with the Executive power, by virtue of the Constitution.

Again: The Judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts, as Congress may, from time to time, ordain and establish. Again: A grant of power was made to a department not in existence; but, when called into existence, the power vested by virtue of this grant. If the several Electors could abridge the powers of Congress or of the President, by conditions annexed to their ballots, then Congress could abridge the power of the courts by conditions annexed to their appointment.

SECTION XLVIII.

" It has been established, ever since the time of Lord " COKE, that where a power is executed, *the person taking* " *under it, takes under him who created the power, and not* " *under him who executes it.*"

Lord TENTERDEN, in *Doe ex dem.*, *Wigan* v. *Jones*, 10 B. and C., 459, p. 467. To the same effect are the cases of

Skeeles v. *Shearly*, 3 Mylne & Craig, 112,
and *Willard* v. *Nason*, 5 Mass. 240.

And going back to Littleton's Tenures, Sec. 169, we find the same doctrine in his quaint expression. Coke's Commentaries thereon, are as follows:

" For, albeit the executors in this case have no estate or " interest in the land, but only a bare and naked power, " yet, this feofment (by the executors) amounteth to an " alienation, to vest the land in the feoffee as it appeareth " here, *and the feoffee shall be in by the devisor.*"

" And therefore, if, by the custom, a man deviseth that " a reversion or any other thing that lyeth in grant, shall " be sold by the executors, they may sell the same with- " out deed, *for the vendee shall be in by the devisor, and not* " *by the executors*, as hath been said."

That this doctrine has been established ever since that early date, appears in the following succession of cases:

Lord Stafford's case, 8 Co. Rep., 77 a.
Cook v. *Duckenfield*, 2 Atk., 562, p. 565, 567 and 568.
Bradish v. *Gibbs*, 3 Johns. Ch., 555.
Thompson v. *Livingston*, 4 Sanf., 539.
Roach v. *Wadham*, 6 East., 289.

"*The title rests upon the act creating the power, and* "*takes effect as if created by the original deed.*" This is the statement in *Doolittle* v. *Lewis*, 7 Johns. Ch., 45, p. 48.

And the doctrine, as laid down in the cases cited, from Johnson's Chancery Reports, Sanford and Atkyns, is, that the conveyance by the original grantor or devisor, and the appointment under the power, are, though by different deeds at remote periods, to be considered as but one and the same act and conveyance of the original grantor:—Both deeds are to be considered together but one instrument.

It is true, that—as between individuals—as to matters relating merely to property, the law would not take hold of a grant, where either the person to appoint or the object to take the grant, was not *in esse*, and would declare the use void, destroying both the power and the grant; but, as to charities, and things denominated *beneficial*, the principle was well established, that the charity or benefits were to be considered *as the substance;* and it mattered not how uncertain the persons or objects may be, or whether the persons who are to take, are *in esse* or not, or whether the legatee be a corporation, capable in law of taking, or not, whether the bequest can be carried into exact execution, or not,—in all these, and the like cases, the legacy will be sustained, and effect given to it *according to its own principles.*

(For authorities see Appendix to 4th Wheaton's Reports, especially pp. 10, 11, 12.)

Thus we see that this grant and power could be carried into effect under known and recognized principles, being beneficial: The fundamental principle being, that the sub-

stance was to be preserved, and not sacrificed to the means, and the end attained, and, at all events.

The preservation of the object and design of the people, then, has caused the Constitution to overleap technical hindrances, and prevented the sacrifice of the end to the means; and the next step, upon the foregoing principles, finds the appointment of Congress and of the President, and the grant of power by the people to the Courts and Judges, —one and the same act of the people. And as the grantor does not limit the grant, and the substance and object of the grant is best subserved by making it complete, where is the authority to limit or divest the power granted?

The words "constitute" and "ordain" are, in the dictionaries, treated as almost synonyms of *appoint;* each is given as a definition of the other; yet both are used as implying more complete investment in a power or office, than appointment to it. And the word "establish" implies no power to render infirm, but only, to fix firmly and unalterably *in* the power.

"Create" is not used in the Constitution, in relation to the Courts, or any of them; and the doctine, that the Courts are, or can be, the *creatures* of the Legislature,—having no power or functions but those which it *creates*—can find no support either in the words, the substance, the object, or in any established rule of construction, as the enactment of the people.

SECTION XLIX.

Before proceeding to group the cases affecting, or supposed to affect this question, I will quote the language of *Irvine* v. *Marshall*, 20 How., p. 564, which seems to be an acknowledgment of the principles we have advocated. It is in these words:

"With regard to the fourth objection, of a want of jurisdiction in the courts of the United States, in the absence of express statutory provisions, to recognize and enforce a resulting trust, like that presented by the present case, it is a sufficient response to say, that the jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily implied, by and under the Constitution and laws of the United States.

Those courts are created courts of common law and equity; and under whichever of these classes of jurisprudence such rights or duties may fall, or be appropriately ranged, they are to be taken cognizance of and adjudicated according to the settled and known principles of that division to which they belong.

"By the language of the Constitution it is expressly declared, (Art. 3d, sec. 2, clause 1,) that the judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority. By the statute which organized the judiciary of the United States, it is provided, that the Circuit Courts shall have jurisdiction of suits of a civil nature "at common

" law or in equity." (Vide 1 Stat. at L., p. 78, section 11.)
" In the interpretation of these clauses of the Constitution
" and the statute, this court had repeatedly ruled, that by
" cases at common law are to be understood suits in which
" legal rights are to be ascertained and determined, in con-
" tradistinction to those where equitable rights, alone, are
" recognized, and equitable remedies are administered.
" (Vide *Parsons* v. *Bedford*, 3 Pet. 447, and *Robinson* v.
" *Campbell*, 3 Wheaton, 212.) That by cases in equity
" are to be understood suits in which relief is sought
" according to the principles and practice of the equity
" jurisdiction as established in English jurisprudence.
" Vide the case of *Robinson* v. *Campbell*, just cited,
" and the *United States* v. *Howland*, 4 Wheaton, 108.)

" Here, then, is an exposition both of the Constitu-
" tion and laws of the United States, with reference both
" to the jurisdiction and powers of their courts, and to the
" instances in which it is their duty to exercise those pow-
" ers; and the inquiry forces itself upon us, who shall or
" can have the authority to deprive them of those powers
" and that jurisdiction? or can those courts, consistently
" with their duty, refuse to exert those powers and that
" jurisdiction for the protection of rights arising under the
" Constitution and laws, in the acceptation in which both
" have been interpreted and sanctioned?"

SECTION L.

The Constitution vested in the supreme Court Original Jurisdiction in certain cases.

In 1793, in the case of *Chisholm* v. *Georgia*, 2 Dallas, 419, Mr. Randolph, the Attorney General of the United States, took, as the basis of his argument, this construction of the Constitution (p. 432): "That the moment the Su- "preme Court is formed, it is to exercise all the judicial "power, vested in it by the Constitution, by its own au- "thority, whether the legislature has prescribed methods "of doing so, or not." And Judge IREDELL, in his opinion, dissenting from the views of the court, says (p. 432): "My "conception of the Constitution is entirely different. I "conceive that all the courts of the United States must "receive, not merely their organization as to the number of "Judges, of which they are to consist, but all their author- "ity as to the manner of their proceeding, from the legis- "lature only." And again, (at p. 449) he recapitulates: "The Constitution, so far as it respects the judicial author- "ity, can only be carried into effect, by Acts of the legis- "lature, appointing courts and prescribing their methods "of proceeding."

The decisions of the court were delivered *seriatim:* Justice BLAIR says(page 450): "The Constitution of the "United States is the only fountain from which I shall draw, the only authority to which I shall appeal." * * (p. 451): "after describing, generally, the judicial powers "of the United States, the Constitution goes on to speak "of it distributively, and gives to the Supreme Court orig-

" inal jurisdiction, among other instances, in the case where " a State shall be a party."

WILSON, Justice, says (p. 461): " I am, thirdly and " chiefly, to examine the important question, now before " us, by the Constitution of the United States and the le- " gitimate result of that valuable instrument.

" Under this view, the question is naturally subdivided " in two others: (1.) *Could* the Constitution of the Uni- " ted States vest a jurisdiction over the State of Georgia?

" (2.) *Has* that Constitution vested such jurisdiction in this court?

" I have already remarked that, in the practice and " even in the *science* of politics, there has been frequently " a strong current against the *natural* order of things, and " an *inconsiderate* or an *interested* disposition to sacrifice " the *end* to the *means*. Even in almost every nation " which has been denominated *free*, the *State* has assumed " a supercilious prominence above the *People*, who have " *formed* it. In *despotic* governments, the *government* has " usurped, in a similar manner, both upon the *State* and " the *People*." * * * " In each, *Man* is degraded from " the *prime* rank which he ought to hold in human affairs; " in the latter, the State as well as the Man is degraded."

* * * (p. 463): " Our National scene opens with " the most magnificent object which the Nation could pre- " sent: 'THE PEOPLE of the *United States*' are the first " personages introduced. Who were those people? They " were the citizens of thirteen States, each of which had a " separate Constitution and Government, and all of which " were connected together by articles of confederation.

" To the purposes of public strength and felicity, that

" confederacy was totally inadequate. A requisition on " the several States terminated its *legislative* authority: " *Executive* or *judicial* authority, it had none. In order, " therefore, to form a more perfect union, to *establish jus-* " *tice*, to ensure domestic tranquility, to provide for com- " mon defence and to secure the blessings of liberty, *those* " *people* ordained and established the present Constitution.

" By that Constitution, legislative power is vested, " executive power is vested, *judicial* power is vested."

And the first question is answered, that the Constitution could vest a jurisdiction.

p. 464. " The next question is: Has the Constitution " done so?"

* * * " Ever since the time of *Bracton*, the maxim, " I believe, has been deemed a good one: '*Supervacuum* '" *esset leges condere, nisi esset qui leges tueretur.*' (Bracton, " 107): 'It would be superfluous to make laws, unless " ' those laws, when made, were to be enforced.'

" When the laws are plain, and the application of them " is uncontroverted, they are enforced immediately by the " *Executive* Authority of the Government. When the " application of them is doubtful or intricate, the interpo- " sition of the *Judicial* Authority becomes necessary. " The same principle, therefore, which directed us from " the first to the second step, will direct us from the sec- " ond to the third and last step of our deduction. Fair " and conclusive deduction, then, evinces, that the *people* " of the United States did vest this Court with jur- " isdiction.

* * * (p. 465): " Whoever considers, in a com- " bined and comprehensive view, the general texture of " the Constitution, will be satisfied that the people of the

" United States intended to form themselves into a Nation
" for *National* purposes. They instituted for such pur-
" purposes, a National Government, *complete in all its*
" *parts*, with powers executive, legislative and judiciary,
" and in all those powers extending over the whole
" nation."

CUSHING, Justice, (p. 466) found the warrant only in the Constitution (s. 2, art. 3): The judicial power shall extend to all cases, &c.

JAY, Chief Justice, having examined the manner in which the people, individually, and the States, as States were liable to need justice or to do injustice, and stated, what was clearly understood, that " from the crown
" of Great Britain the sovreignty of their country
" passed to the people of it,"—continues (p. 474):

" These were among the evils, against which it was
" proper for the nation, that is, the people of all the
" United States, to provide, by a national judiciary, to be
" instituted by the whole nation, and to be responsible to
" the whole nation.

" Let us now turn to the Constitution.

" The people therein declare that their design, in its es-
" tablishment, comprehended six objects: 1st, To form a
" more perfect union; 2d, To establish justice; 3d, To
" ensure domestic tranquility; 4th, To provide for the
" common defence; 5th, To promote the general welfare;
" 6th, To secure the blessings of liberty to themselves
" and their posterity. * * * * *

" It may be asked, what is the precise sense and latitude
" in which the words, *to establish justice*, as here used, are
" to be understood?

"The answer to this question, will result from the pro-
"visions made in the Constitution, on this head. They
"are specified in the second section of the third article,
"where it is ordained that the judicial power of the United
"States shall extend to ten descriptions of cases, viz:

"1st. To all cases arising under this Constitution; be-
"cause the meaning, construction and operation of a com-
"pact ought always to be ascertained by all the parties,
"or by authority, derived only from them.

"2d. To all cases arising under the laws of the United
"States; because, as such laws, constitutionally made, are
"obligatory on each State, the measure of obligation and
"obedience ought not to be decided and fixed by the party,
"from whom they are due, but by a tribunal, deriving
"authority from both the parties."

Having enumerated the ten divisions, the Chief Justice continues (p. 476): "Even this cursory view of the judicial "powers of the United States, leaves the mind strongly "impressed with the importance of them, to the preserva-"tion of the tranquility, the equal sovereignty and the "equal right of the people." * * * "The ordinary "rules of construction will easily decide whether these "words are to be understood in a limited sense. This ex-"tension of power is *remedial*." * * * "It is, there-"fore, to be construed liberally."

Upon this reasoning the Chief Justice founds his opinion, also.

And the whole Court—except Justice IREDELL, who dissented—, having laid down these principles, which must not only govern this, but all other cases in which they are involved, refused to sacrifice the *end* of the Constitution to the *means*;—refused to dissent, with Justice IREDELL, from

the position, that the Constitution had formed a government, complete in all its parts, with powers executive, legislative, and judicial, and in all those powers extending to the whole nation,—and—though Congress had provided no means, whatever—construed the direct constitutional grant of power most liberally, issued an original writ, prescribed an original manner of service, and assumed, to the full extent, the jurisdiction which had been denied.

This case, in addition to its judicial authority, has also the weight of contemporaneous construction: Decided within four years after the Constitution was enacted,—advocated by Randolph, and adjudged by Jay, Wilson, Cushing and Blair, two of whom (Wilson and Blair) were members of the Convention which framed that instrument, and all, among those who have ever been considered as its ablest expounders.

The authority of the principles, there laid down, so far as they establish that the power of the supreme Court is derived directly from the people, has never been denied by any adjudged case.

On the contrary, a number of cases, extending almost to the present time, have re-iterated the doctrine.

SECTION LI.

And, in 1838, in a case of the highest dignity, *The State of Rhode Island* v. *The State of Massachusetts* (12 Peters, 657) took occasion to re-iterate the principles, thus (p. 719): "Those States, in their highest sovereign capacity, " in the convention of the people thereof, on whom, by " the revolution, the prerogative of the Crown, and the " transcendent power of parliament devolved, in a pleni- " tude, unimpaired by any act, and controllable by no au- " thority, 6 Wheat., 651, 8 Wheat., 584, 88;—adopted the " Constitution, by which they, respectively, made to the " United States a grant of judicial power over two or more " States.

" By this grant, this Court has acquired jurisdiction over " the parties in this cause, by their own consent and dele- " gated authority,—as their agent for executing the judi- " cial power of the United States in the cases specified.

" Massachusetts has appeared, submitted to the process " in her legislative capacity, and plead in bar, to the plain- " tiff's action, certain matters, on which the judgment of " the court is is asked. All doubts as to jurisdiction over " the parties, are thus at rest, as well by the grant of power " by the people, as the submission of the legislature to the " process."

Note, that, as consent of parties cannot confer jurisdiction (*Montgomery* v. *Anderson*, 21, How., 386; *Ballance* v. *Forsythe*, 21. How., 389), the only real foundation for this decision must have been the grant of jurisdiction by the people; and is so stated,—(page 721): " Our next inquiry

" will be, whether we have jurisdiction of the subject mat-
" ters of the suit, to hear and determine them." * * *
" Though the Constitution does not in terms extend the
" judicial power to all controversies between two or more
" States, yet, it in terms excludes none, whatever may be
" their nature or subject. It is, therefore, a question of
" construction, whether the controversy in the present case,
" is within the grant of judicial power.

" The solution of this question must necessarily depend
" on the words of the Constitution; the meaning and in-
" tention of the Convention which framed and proposed it,
" for adoption and ratification, to the conventions of the
" people of and in the several States; together with a re-
" ference to such sources of judicial information, as are re-
" sorted to by all Courts in construing statutes, and to
" which this court has always resorted in construing the
" Constitution * * * * * * *
" (722): This court, in construing the Constitution as to the
" grant of powers to the United States * * * , has
" ever held that an exception of any particular case, pre-
" supposes that those which are not excepted, are em-
" braced within the grant or prohibition, and has laid it
" down as a general rule, that, where no exception is made
" in terms, none will be made by mere implication or con-
" struction. 6 Wheat., 378; 8 Wheat., 489, 490; 12
" Wheat., 438; 9 Wheat., 206, 207, 216 * *
" * * * (p. 729): In front of the Constitution is a
" declaration by the Sovereign power from which it ema-
" nated,—that it was ordained in order to form a more per-
" fect union, establish justice, insure domestic tranquility,
" &c.

" Whether it was best calculated to effect these objects
" by making the judicial power utterly incompetent to ex-

" ercise a jurisdiction, * * * or, whether the powers, " granted to this court, by the People of all the States, " ought, by mere construction and implication, to be held " inefficient for the objects of its creation, and not capable " of 'establishing justice' * * * are the questions " before us for consideration." * * (p. 731): "When " the court judicially inspects the Articles of Confedera- " tion, the preamble to the Constitution, together with the " surrender, by the States, of all power to settle their con- " tested boundaries, with the express grant of original ju- " risdiction to this court,—we feel not only authorized, but " bound to declare, that it is capable of applying its judi- " cial power. * * *

" There is but one power, in this Union, paramount to " that by which, in our opinion, this jurisdiction has been " granted;—that power has been exerted in the 11th " Amendment."

It is clearly the settled law, that the Constitution gave, —and nothing, but a change in the Constitution can take away—the original jurisdiction and judicial power, vested in the Supreme Court.

SECTION LII.

The appellate powers of the Supreme Court are given by the Constitution and not by the statutes.

Durrousseau v. *U. S.*, 6 Cranch, 313, (cited ante).

Marbury v. *Madison*, 1 Cranch, 154.

Wilson v. *Mason*, 1 Cranch, 91, 92.

1796. "The Constitution, distributing the judicial "power of the *United States*, vests in the Supreme Court "an original as well as an appellate jurisdiction. The orig- "inal jurisdiction, however, is confined to cases affecting "ambassadors, other public ministers and consuls, and "those in which a State shall be a party. In all other "cases only an appellate jurisdiction is given to the court; "and even the appellate jurisdiction is, likewise, qualified, "inasmuch as it is given with such exceptions and under "such regulations as the Congress shall make."

Wiscart v. *D'Auchy*, 3 Dall., 327.

The manner in which these exceptions and regulations were originally made, is stated in

Durrousseau v. *U. S.*, 6 Cranch, p. 314.

by MARSHALL, C. J.: "When the first legislature of "the Union proceeded to carry the third Article of the "Constitution into effect, they must be understood as in- "tending to execute the power they possessed, of making "exceptions to the appellate jurisdiction of the supreme "court. They have not, indeed, made these exceptions in "express terms. They have not declared that the appel- "late power of the court shall not extend to certain cases;

" but they have described, affirmatively, its jurisdiction; and
" this affirmative description has been understood to imply
" a negative on the exercise of such appellate power as is
" not comprehended within it. The spirit, as well as the
" letter of the statute, must be respected, and where the
" whole context of the law demonstrates a particular intent
" in the legislature to effect a certain object, some degree
" of implication may be called in, to aid that intent. It is
" upon this principle that the court implies a legislative
" exception from its Constitutional appellate power, in the
" legislative affirmative description of those powers."

SECTION LIII.

This doctrine: that the original and appellate powers of the supreme Court were granted by the people, and vested in that court as part of the judicial power of the United States, and that the statute was, as to that court, intended only to operate as an execution of the power of making exceptions to its appellate powers,—has never been denied by any adjudged case in direct terms; and, certainly, a principle, so carefully considered, and repeatedly decided, and supported by such conclusive reasoning, could not have been reversed without some direct reference to the intention to do so, and would not be by mere inference from the use of a single phrase. Yet, we find about 100 decisions, extending through the reports, from 1800 down to the present time, from which it might be inferred that the supreme Court derived its jurisdiction and power from Congress.

As an instance, the Court, by STORY, J., in *Crowell* v. *Randall*, 10 Peters, 391, speaking of Section 25, ch. 20, Judiciary Act of 1789, said: "That section *confers* appellate jurisdiction on this court," and afterwards, even to the present, notwithstanding the decision in 12 Peters, that the jurisdiction was given, and can only be taken away by the power which made and can alter the Constitution,—the same inaccuracy has been indulged, in speaking upon this subject, in all cases where the issue has not been directly on the Constitutional grant. For instance: In the 20th Howard it is thrice decided that the supreme Court

" derived no jurisdiction by virtue of the 25th Section of " the Judiciary Act."

Wayman v. *Morris*, 20 How., 3.
Christ Church v. *County of Philadelphia*, 20 How., 26.
Withers v. *Buckley*, 20 How., 34.

In the 22d volume it was held, in two cases, that the supreme Court had jurisdiction under the 25th section, viz:

Little v. *Arkansas*, 22 How., 193.
Berthold v. *McDonald*, 22 How., 334.

The fact that the form was so used long and continuously, before as well as since the case of Rhode Island v. Massachusetts, shows conclusively that no decision or inference was intended contrary to the principles of the cases where the grant of the Constitution had been directly in issue, and that the use of the words was an inaccurate and almost inadvertent use of a popular expression.

SECTION LIV.

Let us now recapitulate and digest the authorities and principles, which have been developed, with reference to their direct bearing upon this case.

The principle advanced is, that the moment the supreme Court and the courts inferior thereto, were formed, they constituted a complete judicial department of the Government, and received by the direct grant of the Constitution, the entire judicial power of the United States. Where the original jurisdiction is not in the highest court, it is in the courts inferior thereto, vested by the Constitution, and only to be divested from the system, by the power which framed and can alter that fundamental law.

If this proposition is maintained, the motion to dismiss the suit for want of jurisdiction, must be denied.

The statutes, on which the motion is based, are powerless to oust it.

The questions, whether the complaint states facts sufficient to entitle the plaintiff to relief, or whether the matters stated are true, cannot be considered, at all, or decided, so long as its jurisdiction to hear the complaint or prayer, is disputed; for—jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them.

Rhode Island v. *Massachusetts*, 12 Peters, 657.

The question on trial is:

Has the Court jurisdiction over the parties and subject matter, in any form?

SECTION LV.

(1). In *Chisholm* v. *Georgia* (cited and quoted in Sec. 50, ante), the dissenting opinion covered all the courts without distinction. Justice Blair said: "After describ-"ing generally the judicial powers of the United States, "the Constitution goes on to speak of it distributively, "and gives to the Supreme Court original jurisdiction, "among other instances, in the case where a State shall "be a party." He does not say to what conservator the other cases were committed. The Constitution says, those powers shall be vested in one supreme and in such inferior courts as the Congress may establish.

Justice WILSON held, as the foundation of his decision, that by the Constitution "Legislative power is vested, "executive power is vested, judicial power is vested."

"The people formed "a national government complete "in all its parts with powers executive, legislative and "judiciary, and in all those powers extending over the "whole nation."

In Hayburns' case, which had just preceeded this, all the Judges, upon the most careful consideration, had determined that the Government was divided into three distinct and independent branches (2 Dall., 410, 411, 412); that the people of the United States had vested in one supreme court and in such inferior courts as the Congress shall establish "*the judicial power of the United States*" (ibid); and—acting not as a supreme Court, but as Courts inferior thereto—had, with the unanimous assent of the other members of those Courts, claimed and de-

clared that the judicial power of the United States had been direct to them.

Judge WILSON then spoke, considerately, and with well weighed words, in describing the Government as complete in all its parts, judiciary as well as legislative or executive.

CUSHING, Justice, did not separate the delegation. He quoted: "The judicial power shall extend to all cases," and based his judgment on the complete grant.

JAY, Chief Justice, saw no divided grant. From the Crown of Great Britain (he said) the soveriegnty of their country passed to the people of it. *They* instituted a national judiciary to remedy the people's evils; and, as the extension of its power is *remedial*, it was to be liberally construed.

By the strongest contemporaneous construction in both cases, and by the direct assertions of the several Circuit Courts, on the questions in Hayburn's case, it appears that, at the date of the Constitution, and for four years thereafter, no distinction as to the constitutional grant of power to the Supreme Court, and the courts inferior thereto, was understood to have been intended by the framers of the Constitution.

(2.) This understanding of the intention of the people, and the operation of their grant, extended to 1801, and then received the sanction of most carefully considered judicial determination, in *Wilson* v. *Mason*, 1 Cranch 91 and 92, in these words: "The Constitution of the United States "gave jurisdiction to the federal Courts in controversies "between citizens of different States. The same Consti- "tution vested in this court an appellate jurisdiction in all "cases where original jurisdiction was given to the infe-

" rior courts, *with only* 'such exceptions and under such " regulations as Congress shall make.' "

As original jurisdiction was not given to the supreme Court in controversies between the citizens of different States, this decision, that the Constitution gave jurisdiction in those cases to the federal Courts, is a decision, that the Constitution gave that jurisdiction directly to the Courts inferior to that court; and, if it was given in those controversies, it was, in the same grant, *given in all cases mentioned in the same section* in the Constitution,—and between the direct delegation of power to the supreme Court and to the Courts inferior thereto, there was no distinction.

And this is precisely the doctrine of *Marbury* v. *Madison*, 1 Cranch, 164. See Sergeant's Constitutional law, 44, 275, 276 to 278, 287 to 290 (2d edition), and cases cited.

This doctrine of the " constitutional right of a citizen of one State to sue a citizen of another State in the Circuit Court of the United States" has been repeatedly recognized.

Suydam v. *Broadnax*, 14 Peters, p. 75
Union Bank v. *Jolly's Adm'r*, 18 How., 503, p. 507.
Hyde v. *Stone*, 20 How., 170, p. 172.
Payne v. *Hook*, 7 Wallace, 430.
Commonwealth of Ky. v. *Dennison, Gov.*, 24 How., pp. 97 and 98.

(3.) The letter of the Constitution vests the judicial power of the United States in one supreme Court, and in the Courts inferior thereto. Not such judicial power as Congress may delegate, but, the judicial power of the United States is vested. (Sec. 2, ante.)

(4.) The absolute right to acquire, possess and enjoy property,—the formation of the nation, and enactment of the Constitution to protect that right, with others, forbid that the end and object of the formation of the government should be sacrificed to the means, and require that the Constitution should be most liberally construed, to extend complete and adequate power and means, to attain its ends. And in the grant of the whole judicial power of the United States, extended to all cases in equity as well as at law, we find the only means for the complete accomplishment of its ends. (Sec. 3, ante.)

(5.) The Government of the United States is divided into three distinct and independent branches or departments.

Only certain enumerated legislative powers are vested in the Congress; but, the whole judicial power of the United States has, by the people, been vested in the Courts.

(This we have shown in section 4, ante.)

(6.) The plaintiff has no remedy at law, and this remedy is guarantied by the Constitution. (Sec. 5, ante.)

(7.) The Constitution says, the property shall not be taken but by due process of law; and the legislature abrogates it and says, no Court shall enforce the Constitution and stay the seizure made without law.

Two objects moved the statesmen who framed, and the people who enacted the Constitution, to establish courts of justice,—and it may be presumed that they intended to give them powers adequate to their accomplishment:—

To establish justice, and to ensure domestic tranquility.

It is clear that justice is not established by the formation

of any system, by means of which property, which the citizen owns and has the right to possess and to enjoy, can be taken from him without law, without remedy or redress.

And it is equally clear that if such things can be done, uncurbed, domestic tranquility is not ensured.

Domestic concerns cannot be tranquilly carried on, with such dangers surrounding; nor would any considerable number tranquilly submit to such high-handed extortion. And a matter, which might easily have been remedied by individual application to the courts,—they having the power to remedy it,—might, being unremedied, in a single administration, breed rebellion and civil war.

(8.) One of the complaints against the king of Great Britain was, that he had obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

Courts they had; but judiciary powers, sufficient for the administration of justice, had been factiously or captiously withheld.

It is fair to presume that, having felt this want so keenly, the people intended the full meaning of their grant; and, as they vested in one supreme Court and in such inferior Courts as the Congress may establish, the whole judicial powers of the United States, they intended, by vesting, in whatever courts might be established, full power to administer justice in all cases, to prevent possibility of the recurrence of the evil, for which they had revolted, and to make it impossible to obstruct justice, by refusing laws for establishing judiciary powers.

(9.) "He has erected a multitude of new offices, and

" sent hither swarms of officers to harass our people and " eat out their substance."

Who was ever harassed more than this plaintiff? He has paid on everything;—and now the government will take a tax on nothing. The courts decide it cannot collect it by suit, and has no right to it at all; and it distrains his substance. Distressed by losses, he feels that he cannot pay; but it distrains all he has, and points him to the distant recompense of an expensive law suit. All this wrong, for which they rebelled, the people could have prevented by vesting the judicial power of the United States in the Courts, complete.

And their rebellion furnishes a rule of construction: It must be concluded that they meant what they said, and did not intend by implication to give to Congress or any President power to harass the people, and eat out their substance, and obstruct the administration of justice, by refusing the assent of laws for establishing judiciary powers that could remedy the wrong.

The legislature has not the power,—either among those enumerated in the Constitution or those necessarily incident to the enumerated powers,—to enact a void statute; nor, having enacted, to set sufficient power at work to execute it, and then, to make its usurpation effectual, to deprive the citizen of the protection of the judicial power of the United States.

Nor can it, in the exercise of those enumerated and incidental powers, destroy life or liberty, or divest property and, by taking away the remedy, evade the plain provision of the same Constitution that gave it all its powers: "No " man shall be deprived of life, liberty or property but by " the judgment of his peers or the law of the land."

The power is not only not enumerated, but, by this declaration, is forbidden; and such interference with the judicial department, is utterly inconsistent with the principle, so well established by the early cases, that this government is divided into three, not only separate, but also independent departments.

In this connection we are considering the logical result of the Constitution: If the court will not carry the Constitution to its logical end, and if we are compelled by the action of this court to accept the half-way doctrine, that the joint action of the people and the legislature were necessary, in order not only to establish, but also to empower the department, and that the dissenting opinion in *Chisholm* v. *Georgia*, is the law,—then we shall still insist that, as it took the joint action to give the power, joint action alone can take it away.

Such would be the rule if the joint constituents were equal in power; but when the one is infinitely superior, and empowered the other to join with it in the grant, merely for the purpose of more effectually carrying its design into effect,—by what reasoning can it be shown that the subordinate may, alone, withdraw the entire delegation for the very purpose (intentional or unintentional) of thwarting and defeating the design of the principal in its creation?

(10.) From the preceeding argument and authorities (Sec. 6), we have seen, that *the source of judicial power is in the Constitution alone, and the power is complete in the Courts;*—

That this is the doctrine of *Marbury* v. *Madison*:

"The laws of his country afford him a remedy"; and

McClung v. *Silliman*, and *McIntire* v. *Wood*, only decide that this remedy is not afforded by the Acts of Congress;—

Ergo: The remedy is afforded by the Constitutional grant of power.

The syllogism, based on the words "Constitute tribunal," has shown our premise (ante, Sec. 7.)

Contemporaneous construction, and the constant usage of Courts, from 1780 to 1800, and adjudged authority, show that Courts were fully constituted, merely by being called into existence. Therefore, the power to constitute tribunals did not name nor imply power to regulate process or define the powers; and, so constituted, they possessed, under the Constitution, the judicial power of the United States (ante, Sec. 7.)

The very essence of civil liberty requires, for its perpetuation, this construction of the grant. A contrary construction denies that liberty. Therefore, one of the most common and most approved rules of construction of statutes, requires that the most beneficent construction shall be given to the Constitution, if its words will admit of it. Its words clearly convey this construction; nor can they be construed in any other manner, unless a necessary implication, from the other words, forbid such a construction.

It is a further rule of construction that, where any mere implication from the words of a statute, is unbenignant or adverse to liberty or those things which are necessary to its complete enjoyment, or defeat, or tend to defeat the apparent design of the makers of the law,—such implication cannot be indulged, but is positively forbidden.

All these conditions unite to forbid the implication in question. And, as Courts of Justice, the Courts, once constituted, can, as a system, afford a remedy for every violation of right.

(11.) We have seen also (Sec. 7) that, though Congress —when necessary or proper for carrying into full and perfect execution the powers, committed to the judicial department by the people, and making them most efficient, according to the design of the Constitution—may prescribe process, divide the country into districts, and make many regulations to that end,—it cannot limit, or take away from that department, any portion of the whole judicial power of the United States.

(12.) We have seen also (Sec. 8) that the Courts of original jurisdiction are, as to all the cases mentioned in the Constitution, common law Courts of Justice, and, as such, can administer a remedy for every wrong.

(13.) We have also seen (in Sec. 9 and 10, ante) the derivation of the power of the Courts of England from the King, its fountain and source:—

That he had delegated his whole judicial power to the *Judges* of the several courts; that their power and jurisdiction cannot be changed without altering the Constitution of England; that, under this system, there could be no failure of justice, because the whole system has all the original absolute judicial powers of the King; that this system, with its absolute power to remedy every wrong, was the Constitutional right of every Englishman, and, as such, was brought to America as the right of every Colonist.

(14.) We have seen (in Sec. 11) that the Constitution, in the light of history, reads:—"As the *whole judicial power* of England is vested in, and distributed among her Courts, and the laws must be therein administered according to the power committed to their care—so we, the people of the United States, to *establish justice and secure liberty and*

domestic tranquillity, do vest in, and distribute among our Courts the whole judicial power of the United States ;

As the authority came from the Crown—whoever commissioned the Court or Judge—so we delegate without limit, and alone control, the judicial power;

As the greater security of the liberty of the subject was the object of prime solicitude,—so the greater security of the citizen's liberty is *our* first desire and object; he must find a remedy for every wrong, a protection from every usurpation, in the strong arm of the Courts. And when the power, which we, in order more perfectly to attain our object, have designated to give the commission, under our authority, has named the recipient, its authority, under that delegation, is *functus officio*.—It may pass all laws, necessary and proper to give the most complete effect to our grant, and attain our desire and object most perfectly, but not one, to limit the grant or defeat our design.

(15.) We have seen (Sec. 12) that, as the whole judicial power of England was committed to, and distributed among one supreme Court and Courts inferior thereto,—so Congress was empowered to constitute a like system, and no other, for America, and to keep that system sufficient for all the wants of the nation;

That as Congress accepted the delegated power, it is bound to exercise it; and its obligation furnishes the rule, that its Acts shall be construed so as to give the most complete effect to the design of the constituent; and any portion of its Acts which affect to limit the grant or prevent its full operation, must, as in other cases of trusts, be construed as *declaratory*, merely, or rejected as without the power. And in any system, constituted by Congress, must always have been found the power to protect the right.

(16.) We have seen (Sec. 13) that the subject matter of every violation of any right, claimed under the laws of England, was within the jurisdiction of every Court of superior jurisdiction, and is also within the jurisdiction of the Courts of the United States inferior to the supreme Court; and that the full power of Chancery is found in some Court of original jurisdiction, in the United States.

(17.) We have seen, by English comparison (Sec. 14), that *our* Courts are the people's courts, and exercise the judicial power of the United States, and, as incident to their existence, hold, distributed among the system, complete power to afford a remedy for every violation of right, and complete protection or redress from every wrong,—just as the people could have done.

(18.) In Section 15, we have examined the judicial Acts of the United States, and find them agreeable to this construction. They constitute the Courts, divide the powers among them, and, in other respects, are but declaratory, except where they exercise the constitutional right of regulating, or excepting from, the appellate jurisdiction of the supreme Court.

By Section 11, Act of 1789, the judicial power of the United States, in *all suits of common law or in Equity*, is assigned to the Circuit Courts. Under this assignment we have applied, in this suit, to the tribunal designated to hear it,—and—it has jurisdiction.

(19) In Section 16, we have examined this statute, by its title, by the *res gestæ*, by the Constitution, by three well-understood rules of construction, and by its own words,—and have found the system capable of receiving the power to administer the whole judicial power of the United States; and that the power to grant the remedies in the case at bar, was distributed to the Circuit Courts;

that it cannot again be divested, without destroying the effect of a Constitutional enactment; and that the power which assigned it, is *functus officio*, till the more effectual operation of the Constitution shall require a new assignment.

(20.) We have seen (Sections 17, 18, 19 and 20) that the doctrine, that we have no Common Law, considered as a source of jurisdiction, is a fallacy. (See *post*).

(21.) We have seen (Sections 21, 22 and 23) that the people, in the Constitution, vested the powers of Government in three departments, outlined a judicial system, and treated the powers granted to the judicial system or department as vested powers—directly vested by the Constitution.

(22.) That (Section 24) the word: "supreme," in the Constitution, was written as an adjective, to designate the highest in authority, with express reference to the use of the same word in England, to designate its Court of highest authority and ultimate appeal; and that there is no distinction in the people's grant of power, between the grant to the supreme Court and to those inferior thereto; that the judges of both are insured the same stability of office, and that to both, jurisdiction of parties and subject matter is given.

(23.) The word: "vest" (Section 25) gives an immediate or fixed right of present or future enjoyment of the powers named; and as soon as the system of Courts was formed, the grant—as with the executive and legislative departments—took effect, and an immediate and fixed right to all the powers assigned to the System by the Constitution, at once accrued.

(24.) We have analyzed the Common Law, and find it to consist of principles of justice, which are illustrated and ascertained in their application to myriads of individual cases, by Courts of Justice, ample to adapt themselves to, and protect, persons and property among the diverse local usages and customs of England and this Country, and to form the substratum and foundation of our Constitution itself. (Section 26). We have seen why these special remedies are granted, (Section 27), and that, in the United States, the law provides a remedy for every violation of right, as fully as the Common Law of England ever did, and by the same warrant. (Section 28.)

(25.) We have seen, (in Sections 28 and 29),—in the case which forms an era in judicial history,—that the power to remedy every wrong was vested in the judicial System, and that the Circuit Court had, from the Constitution itself, the power to hear this cause and give the remedy.

(26.) We have seen, also, that there is no remedy in State Courts, (Section 31), and, further, that whether there is, or not, does not affect the remedy in United States Courts.

(27.) We have analyzed the power of appointment, and find that such a power implies no power to control the appointee, vary the grant to him, or revoke the grant.

(28.) We have analyzed the words used in these connections.

(29.) We have sought, in vain, for a resting place for the judicial power, after the delegation and before the existence of a Congress,—and have found it in abeyance, only, not for Congress to receive it or hold it, but to invest the Courts when they should be created.

(30.) (Sections 39 and 40). We have sought, in vain, for any delegation of judicial power to Congress, or any authority to grant; and have found that the power to appoint Courts, was not a power to convey anything to them,—and have analyzed the formation of Courts, and the power delegated.

(31.) We have tested the construction by the spirit of the Act, and have found that, unless it, of itself, gives a remedy, it is hideous in deformity, false, worthless and meaningless;—we have found judicial authority, that, unless the power to grant the remedy, is vested, the case presents the monstrous absurdity in a well-organized government,—that there is no remedy, although a clear and undeniable right is shown to exist.

(32.) We have seen (Sections 45 and 46) that the question is, whether this monstrous absurdity, advanced in *McClung* v. *Silliman*, or honest justice, supported in *Marbury* v. *Madison*, is the law,—and have endeavored to answer it.

(33.) We have seen that no department was in existence when the grant of power was made, but each, when constituted, received the grant direct.

(34.) In Section 49 we have found a principle enunciated, not for that particular case only, but for all it could cover: "That the jurisdiction of the Courts of the United "States is properly commensurate with every right and "duty, created, declared or necessarily implied by and un-"der the Constitution and the laws of the United States. "Those Courts are created Courts of Common Law and "Equity; and, under whichsoever of these classes of juris-"prudence such rights or duties may fall, or be appro-"priately ranged, *they are to be taken cognizance of* and

" adjudicated according to the settled and known prin-
" ciples of that division to which they belong."

(35.) We have seen (Sections 50 & 51,) that the Constitution vested in the supreme Court original jurisdiction in certain cases, and that its appellate powers are given by the Constitution, and not by the statutes (Sec. 52); and that the same Constitution, without any diversity in its operations, gave to the other Courts of original jurisdiction, jurisdiction in all cases named in the 2d Section of the 3d Article.

(36.) We have seen that the end of the Constitution could not be sacrificed to the means;—that, ever since Bracton, it has been deemed a sound maxim, in reference to grants of power to enforce laws, that " it would be super-
" flous to make laws, unless those laws, when made, were
" to be enforced,"—and that, from this very cause, it is to be presumed that, when, to protect the absolute right to acquire, possess and enjoy property, the people made the law: "No man shall be deprived of" * * " property
" but by the judgment of his peers, or the law of the land"
—they, in the same instrument, vested the power to enforce their enactment.

It was superfluous to make the law, if the matter of its enforcement was to be left wholly to the legislature; for, the legislature were as competent to make the law as to consider the expediency of enforcing it.

In fact, the Constitution was made to control the President and Congress; and thence it follows that, if made for them, and superfluous unless enforced, the power to enforce it exists outside and independent of them.

Ex parte Mulligan, 4 Wallace, 120.

(37.) We have seen that "it has ever been held, that an "exception of any particular case presupposes that those, "which are not excepted, are embraced within the grant "or prohibition; and that, where no exception is made "in terms, none will be made by mere implication or con- "struction." (12 Peters, 722.)

We find the grant of judicial power in the words: "shall "be vested in one supreme Court and in such inferior "Courts as the Congress may, from time to time, ordain "and establish." In certain cases the supreme Court shall have original jurisdiction; "*In all the other cases before* "*mentioned*, the supreme Court shall have appellate, juris- "diction, both as to law and fact, with such exceptions "and under such regulations, as the Congress shall make."

Tested by the rule, we find that, as Congress has the Constitutional power of making exceptions in the cases, granted to the appellate powers of the supreme Court, it has no power to except any other cases, mentioned, from the jurisdiction to which they are assigned.

Again: No exception is made, in terms, of any of the cases mentioned, from the jurisdiction of the inferior Courts to which they are assigned, and by this rule: "as no ex- "ception is made in terms, none will be made by mere "implication or construction."

(38.) We have examined the subject in every light which ingenuity can suggest; we have tested the Constitution by every touchstone we can discover,—many of them sanctioned by the highest authority, in the same connection;—

And, by every rule of construction, by every principle of justice, by every well argued and considered case, we have been led back to the same principle, that: the mo-

ment the system was created, it took, by direct grant from the people, all the judicial power of the United States; and that Congress has power to pass such laws as may be necessary or proper to carry the people's delegation to the Courts, into most perfect effect,—but no power to limit or hinder its effect in any form.

SECTION LVI.

Against all this authority we find ranged certain cases, which we will recapitulate:

In Section 17, we have re-examined Chancellor KENT's examination of the question "whether the Courts of the "United States have a common law jurisdiction, and, if "any, to what extent;"—and have seen that, to, and including, the case of Hudson & Goodwin, nothing had been decided, and that, though the ex-Chancellor had made quite an effort to extract some rule which he could deliver to his students, as their guide, his lecture but mirrors his perplexity, and he is compelled to shift the responsibility of the opinion, he inculcated, upon an Essayist, being too good a lawyer himself to assert that "the jarring opinions and decisions" had settled anything.

Up to that time, the question, in the light in which he reviewed it, had received but one clear, logical, exhaustive discussion, and that was, immediately after the only case in which the doctrine, that the courts had not a common law jurisdiction in criminal causes, had been squarely raised; and in that (1 Gallison, 488) Judge STORY had reversed the case of Hudson & Goodwin; and when it came to the supreme Court, every member of the Court, but one, apparently desired a re-argument; but the indolence of the Attorney General thwarted them, and they let it pass, saying, that whenever any person could be found to argue the question, they would divest themselves of the influence of the former case.

It is probable that the question as to criminal matters, will not again soon be raised. The crimes, not included

in the statutes, are few and far between, and are generally small; and no Circuit Judge will charge a Grand Jury to indict and, upon the defendant being convicted, will certify a division of opinion to the Supreme Court, until some case, of sufficient importance to interest the Attorney General, shall cause him to press the question, and assure, its argument in the Supreme Court.

Yet, nothing has really been decided; and we are indebted, not to the cases, but to the essayist, for the prevailing impression, that the principle was fixed by the decisions.

Chancellor KENT, having spent an active life in the administration of State jurisdictions, being thoroughly versed in Common Law and Chancery, having had no acquaintance with any limited jurisdiction which was not inferior, driven from his proper position by an unwise limitation as to age,—became the oracle of a student class, and, with this single exception, was a master of the questions he discussed. This question he, in vain, tried to settle, but confessed it intricate, perplexed and unsettled, and then quoted the essayist who, with less discretion, had attempted to work a legal principle out of a metaphysical discussion.

The Chancellor does not commit himself, but says, the essayist "maintains" (p. 339); and (p. 342), in closing the reference, says in effect: "Even in the Essayist's view, the "common law may still be cultivated, as part of the juris-"prudence of the United States." Closer reading than law students give, is necessary to see, that the Chancellor refused to endorse the essayist's argument with his authority. And thus, for some 45 years, the earliest impressions of almost every lawyer in the Country, have accepted as a principle, inculcated by Chancellor Kent, a doctrine, which he merely quotes as having been advanced by an "able" essayist.

Before leaving this class of cases, it is to be noted that, in the first case (that of Worrall, 2 Dal., 384),—though an opinion by the Circuit Judge, that the Court had no jurisdiction or power, was filed, and an adverse opinion by the District Judge,—it is evident that the Circuit Judge abandoned his opinion; for the Court gave judgment and sentenced the prisoner,—a thing, impossible for an honest Judge, if he believed the prisoner was not within his jurisdiction, and that he was committing an act of usurpation without the authority of law, entering a judgment, from which there was no appeal, and committing an outrage, for which there was no redress.

The sentence was mitigated, not from any doubts as to the power to sentence, but from consideration of the defendant's circumstances.

In the case of *United States* v. *Hudson & Goodwin*, the Court said: the only question which this case presents, is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases. And, if fully and finally decided against us, it would be very questionable, whether it would be a precedent against the claim of a citizen to the enforcement of a direct enactment of the Constitution by the judicial department, organized by the people, for the purpose of enforcing and protecting that fundamental law, and accomplishing its designs.—But, as the argument, rehearsed, though not sanctioned by Chancellor Kent, had its rise in these cases, it may be well to consider the circumstances of this one:

England had pursued a course, which led to the war of 1812; to oppose which, having no navy, it was necessary to resort to other means; and the National Government laid an embargo on all our sea-ports, preventing trade,

and, for nearly a year, compelling idleness in marine industries, and a cessation of marine commerce. About the same time, Tunis and Algiers having by their piracies obtained tribute by way of commutation, Napoleon adopted the same course, and committed the spoliations, seizing many of our vessels, and confiscating them and their cargoes, hoping thereby to make us also tributary to him, and in the end to force us into an alliance against England.

The course of the General Government towards France, has never been accounted for, unless it arose from timidity; and the people of the sea coast, and especially Connecticut, reduced, both by the embargo and by the spoliation, to idleness, poverty and great distress, evinced strong dissatisfaction at the abject condition of the government, and hopeless state, to which its policy was fast reducing them.

A plot for a rebellion was formed, and political factions grew very rancorous and bitter in their spirit; and, among their ebullitions, one of the newspapers charged the President and Congress with having, in secret, voted two millions of dollars as a present to Bonaparte, for leave to make a treaty with Spain.

Contemporaneous history says that the rebellion was quenched; and, while, from party feeling, many were exceedingly bitter, upon both sides, and many influential persons urged the prosecution of every prominent agitator, the more thoughtful were in favor of passing over the matter in silence, and giving time for the discontents to heal. In this view, it was deemed the better policy to let the prosecutions, which had been commenced, die out; and thus the irritating case of Hudson & Goodwin terminated.

Under such circumstances it is easy to see that the Court really sought a pretext to discharge them, and found

it in the opinion which Judge STORY understood to have settled nothing, and which, in the case of Coolidge, the Court, with one exception, agreed should be stripped of its prestige as *res adjudicata*, whenever an argument should be made. And that is the condition, to-day, of the question whether the Circuit Courts of the United States have a common law jurisdiction in cases of crimes against the United States.

SECTION LVII.

The cases of *Shelden* v. *Sill*, 8 How., 441.
Turner v. *Bank of America*, 4 Dallas, 8.
Gibson & Martin v. *Chews*, 16 Peters, 315, and
Dromgoole v. *Farmers & Merchant's Bank*, 2 How., 241,

were decided upon part of the 11th Section of the Judiciary Act, which declares, that no District or Circuit Court "shall have cognizance of any suit to recover the contents "of any promissory note, or other chose in action in favor "of an assignee, unless a suit might have been prosecuted "in such Court, to recover the said contents, if no assign-"ment had been made."

And, it was a mistake, to put a constitutional argument into the cases, or the opinions.

In the case of *Turner* v. *The Bank of America*, it is to be observed that, though there is an argument and, apparently, some "side talk" on the subject, the opinion of the Court does not mention or allude to it.

The judgment was reversed for this error, that, in the record in the Circuit Court—it being a Court of limited jurisdiction,—it did not appear that the assignors of the chose in action sued on, were citizens of a different State from the defendant.

At common law, a chose in action was not assignable, so as to vest in the assignee a right to sue in his own name.

A promissory note was so assignable; but the right of

the assignee to sue in his own name, was not a vested right of property, guaranteed by any principle of natural law, but was subject to the control of the legislature, or even of the local usage of every State: This right was, then, to be granted, denied or qualified by the legislatures of the several States, just as the policy of each State should require. But, if promissory notes, or choses in action, were to become articles of commerce among the several States, then Congress, under the Constitution (Art. 1, Sec. 8, 3), has the power to regulate the commerce in them;—and one of the first items of such regulation would be, to provide, in whose name a suit on the assigned chose, might be brought.

It might be very impolitic to permit a chose, which had been executed under the laws, and with express reference to the local remedies of a particular State,—to be removed to another jurisdiction and different remedies, by sale and assignment; and, in this view, the only questions to be decided, were: (1.) Had Congress regulated this commerce? and (2.) Had Congress forbidden a chose, so accruing, to be removed, by inter-state commerce, beyond the jurisdiction of the local remedies?

The answers being in the affirmative, the Circuit Court had no jurisdiction.

In the case of *Sheldon* v. *Sill*, parallel facts required the same decision.

Congress, in regulating commerce among the States, had so regulated it, that the purchaser of a chose in action must stand precisely in the place of his assignor, as to the locality of his remedies; and the controversy must be that of the assignor, or a precise substitute.

That controversy was not within the jurisdiction, as-

signed by the Constitution, at all; therefore, a decision on what would have been the rule if that controversy had been within the jurisdiction assigned, is simply obiter.

We will, however, examine the obiter remarks:

The Court says: (1.) "It must be admitted that, if the "Constitution had ordained and established the inferior "Courts, and distributed to them their respective powers, "they could not be restricted or divested by Congress."

We have seen that the Constitution had distributed the the judicial powers of the United States between the supreme Court and the Courts inferior thereto, and must dissent from the following premise:

"But as it has made no such distribution,"—and the conclusion drawn:—"one of two consequences must re-"sult: either that each inferior Court, created by Con-"gress, must exercise all the judicial powers not given to "the Supreme Court, or that Congress, having the power "to establish the Courts, must define their respective "jurisdictions."

Now, the Constitution distributed the judicial powers: part of them to the supreme Court, and part to the Courts inferior thereto,—but did not distribute them among those inferior Courts; if it is "necessary and proper, for carry-"ing into execution the powers vested by the Constitu-"tion in the judicial department of the Government of "the United States or in the Judges thereof," a power was given in terms: By the Constitution (Art. 1, Sec. 8, 18), Congress has the power to distribute them; and till such distribution be complete, any Court would have all the powers not assigned to another.

The Court proceeds: "The first of these inferences has

never been asserted, and could not be defended with any show of reason."

It will be observed that the argument for this jurisdiction was very meager: But two cases were cited, one of which did not support the position intended to be maintained by it, viz: that the debt and mortgage did not constitute a chose in action; and the other: *Marbury* v. *Madison*, which decides that the laws outside of the statutes afford a remedy for every wrong;—that the remedy was provided within the power of the Courts, but not of that Court, because the Constitution had distributed it to another, —might as well not have been cited, at all,—for, it was not comprehended. The Court said, hastily, that the position could not be defended with any show of reason. If I have made any show of reason, if the cases cited, have any reason in them, then it is clear that the Court was uninstructed, and had not examined the effect of its language; and its decision could be entitled to no weight as a rule, though not obiter. And we are in the condition Dwarris mentions: appealing from a prince uninformed, to a prince better informed.

The question, whether the jurisdiction of the Court, in such cases, is taken away by this section of the Judiciary Act, is subject to a very simple test: If suit should be brought in the federal Court, upon a promissory note, made by a citizen of Illinois, to one, in the declaration alleged to be a citizen of the same State, or to one, whose residence is not mentioned, and by him assigned to a citizen of another State;—due personal service of process, default or appearance, plea, trial, verdict, judgment and execution, and sale and deed of land thereunder,—and the purchaser should go into possession, and, after the lapse of such time

as to bar a writ of error on the judgment, the original defendant brings ejectment against the purchaser,—would the judgment and deed be a bar?

If this statute affects the jurisdiction of the Court, it could not be a bar; for, the Court being without jurisdiction, its action would be *coram non judice*, and void. Nor could the plea, trial and verdict assist it; for, we have seen that consent of parties cannot confer jurisdiction over any subject matter, not within the jurisdiction of a Court.

And it would make no difference whether it appeared that the assignor was a citizen of Illinois, or not; for "noth-"ing will be intended in favor of the jurisdiction of Courts "of limited jurisdiction."

Rex v. *Inhabitants of Chilverscoton*, 8 T. R. 181, 182.

Bac. Abr. Title Courts, "D" 4.

(See Bouvier's Ed., for U. S. authorities.)

SECTION LVIII.

In *Kendall* v. *The United States*, 12 Peters, 616, et seq., all that was said on the subject was based on *McIntire* v. *Wood* and *McClung* v. *Silliman*, and was not at all necessary to the decision of the case; for, the statute being slightly broader as to the powers of the Circuit Court for the District of Columbia, the Mandamus was issued, and the very thing done which was refused in the cases remarked upon.

SECTION LIX.

The case of *Cary* v. *Curtis*, 3 Howard, 245, was one which seems to have involved the principle that a ministerial officer, proceeding on a warrant, regular on its face, is not liable for his ministerial acts, and is put substantially on that ground.—That the question of jurisdiction was only incidentally mentioned, appears from the remarks following, that, "while it has been deemed proper, in ex-
"amining the question referred by the Circuit Court, to
"clear it of embarrassments, with which, from its sup-
"posed connection with the Constitution, it is thought to
"be environed,—this Court feels satisfied that such em-
"barrassments exist in imagination, only, and not in reality;
"*that the case and question now before them, present no in-*

" *terference with the Constitution*, in any of its provisions, " and may be, and should be disposed of on the plainest " principles of common right."

The plaintiffs had paid the defendant, as collector, $181, claimed as duties, and then sued to recover it back. There was no division of opinion as to the jurisdiction in the Circuit Court; for, it had entertained the suit, tried it, and taken the verdict of the jury. No motion to dismiss, or other question upon the jurisdiction, appeared in the certificate of division.

The case had been tried on the merits; and on the merits the decision was made. (See page 247): " So far as the " liability of agents in this form of action, appears to have " been considered, the general rule certainly is, that the " action should be brought against the principal, and not " against a known agent, who is discharged from liability " by a '*bona fide*' payment over to his principal, unless, " anterior to making payment, he shall have had notice " from the plaintiff of his right and of his intention to " claim the money. The absence of notice will be an " exculpation in every instance; and with regard to the " effect of the notice, in fixing liability upon the agent, " that effect is dependent on the known powers of the " agent, and the character of his agency. If, for instance, " the agent was known to be a mere carrier, or vehicle, to " transfer to his employer the amount received, payment " to the agent, with such knowledge, although accompa- " nied with a denial of the justice of the demand, would " seem to exclude every idea of an agreement, express or " implied, on the part of the agent to refund; and could " furnish no ground for this action against the agent who " should pay over the fund, received, to his principal. This

" doctrine is belived to be sanctioned by the cases of *Green-*
" *away* v. *Hurd*, 4 T. R., 553,—of *Coles* v. *Wright*, 4 Taun-
" ton, 198, and of *Tope* v. *Hockin*, 7 Barn. & Cres., 101.
" 'Tis true that the case in Taunton, and that from Barn-
" well & Creswell, were not instances of payment under
" protest; but the case from 4 T. R. has this common fea-
" ture with that before us, that it was an action against an
" excise officer for duties, said to have been illegally col-
" lected, in which the plaintiff denied the legality of the
" demand, though he subsequently paid it. But all three
" of these cases concur in condemning the hardness of a
" rule which would subject an agent, who is a mere chan-
" nel of conveyance, or delivery, of the amount which
" might pass through his hands. Neither of these cases
" was affected by a positive statutory mandate, requiring
" the agent to make payment over to his principal."

Having thus, and on the following page, established the principles on which an action for money, had and received, could be maintained against an agent, the Court (p. 249) recapitulates them, and brings the case to the test of those rules: considering the Act of Congress in question (upon which the question that had been certified, was: is it a bar?) and, finding that that Act required the collector immediately to pay the money over to the Treasury, continues:

" With full knowledge thus imparted by the law, can it
" be correctly understood that the party making payment
" can, *ex equo et bono*, recover against the officer, for act-
" ing in literal conformity with the law, converting there-
" by the performance of his duty into an offence; or that,
" upon principles of equity and good conscience, an obli-
" gation and a promise to refund shall be implied?" * *

* * * The answer is negative.—"The claimant, "moreover, was not without other modes of redress, had "he chosen to adopt them. He might have asserted his "right to the possession of the goods, either by replevin "or in an action of detinue, or, perhaps, by an action of "trover, upon his tendering the amount of duties, admitted "by him to be due.

"The legitimate inquiry before this Court, *is not, whether* "*all right of action has been taken away from the party*, "and *the Court responds to no such inquiry. The question* "*presented for decision, and the only question decided*, is, "whether, under the notice given by the statute of 1839" (that it is the duty of the officer to pay over the money at once), "payments, made in despite of that notice, "though with a protest against their supposed illegality, "can constitute a ground for that implied obligation to "refund, and for that promise inferred by the law from "such obligation, which are inseparable from, and are, in-"deed, the only foundation of a right of recovery in this "particular form of action; and here is presented the an-"swer to the assertion that, by the Act of 1839, or by the "construction given to it by this Court, the party is debar-"red all access to the Courts of Justice, and left entirely "at the mercy of an executive officer. Neither have Con-"gress nor this Court furnished the slightest ground for "the above assertion."

Upon this case it is clear, that the Court believed that the goods could be replevied from the officer; and as no judicial power, less than that of the United States, would have power to take the property, by force, from the possession of the United States, the federal Court must have had jurisdiction.

However that may be, we have the plain declaration that the case does not decide any point adversely to that position.

SECTION LX.

The case of *The Bank of the United States* v. *Devaux*, 5 Cranch, 61, has been cited to support the necessity of legislative grant, to give the inferior Courts jurisdiction. At page 84 et seq. we find the two points considered in the case:

(1.) "That a right to sue in the federal Courts is conferred on this bank, by the law which creates it."

And it was decided that it was not.

(2.) "That a corporation, composed of citizens of one State, may sue a citizen of another State, in the federal Courts."

And this point was affirmed.

The decision of the first named point was thus expressed: "This power" (to sue), "if not incident to a corporation, is conferred by every incorporating act, and *is not understood to enlarge the jurisdiction of any particular Court*, but to give capacity to the corporation to appear as a corporation in any Court which would, by law, have cognizance of the cause, if brought by individuals. If jurisdiction is given, by this clause, to the federal Courts, it is equally given to all Courts having original jurisdiction, and for all sums, however small they may be."

This quotation shows that the question before us was not considered in considering that point. The decision on the other point is based (p. 87) on the position *that the Constitution had conferred*, and *the Circuit Court was bound to exercise, the jurisdiction* in the case named.

This was the old United States bank; and it will be seen that, though the corporation did maintain its suit in that case, it was expressly held that the law, creating it, gave no jurisdiction to those courts.

This decision was based on the doctrine, that a corporation is the creature of the law creating it and giving it power to act. 2 Cranch, 150.

Such statutes not only create an artificial person, "but "give it every faculty which it possesses: The power to "acquire rights of any description, to transact business of "any description, to make contracts of any description, to "sue on those contracts,—is given and measured by its "charter. This being can acquire no right, make no con- "tract, bring no suit, which is not authorized by law. It "is not only itself a mere creature of a law, but, all its ac- "tions and all its rights are dependent on the same law." (9 Wheat., 823.)

Afterwards, the new bank being formed, it brought suit in the Circuit Court, and the jurisdiction was contested on two grounds:

(1.) That the Act of Congress had not given it

(2.) That, under the Constitution, Congress cannot give it.

On the first point the Court says (*Osborn* v. *U. S. Bank*, 9 Wheaton, p. 817): "The words of the charter are: "'the bank shall be made able and capable in law to sue "'and be sued' * * * 'in all state courts, having "'competent jurisdiction, and in any Circuit Court of the "'United States.' * * * "These words" * * * "cannot be made plainer by explanation. *They give ex-* "*pressly the right 'to sue and to be sued'* in every Cir- "cuit Court of the United States.

"The argument of the appellants is founded on the "opinion, of this Court, in *The Bank of the United States* "v. *Devaux*, (5 Cr., 85). In that case it was decided, that "the former Bank of the United States was not enabled, "by the act which incorporated it, to sue in the federal "Courts."

And thus the first point was answered.

The second point was answered by citing (p. 819) the clause: "The judicial power shall extend to all cases in "law and equity, arising under this Constitution, the laws "of the United States" &c., determining that "this "clause enables the judicial department to receive juris- "diction to the full extent of the Constitution, laws and "treaties of the United States, when any question, respect- "ing them, shall assume such a form that the judicial "power is capable of acting on it. That power is capable "of acting, only when the subject is submitted to it by a "party who asserts his rights in the form prescribed by "law.

"It then becomes a case; and the Constitution declares "that the judicial power shall extend to all cases, arising "under the Constitution, laws and treaties of the United "States."

The Court proceeds to analyze the effect of an Act of incorporation, to give every faculty that the creature possesses, and finds, that the question, respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular cause, and may arise in every cause; and that any case, which it is possible for the corporation to have, must arise under the law of the United States which creates it.

The questions were inaccurately stated. The first was, really: Does the charter impart to the corporation the right to sue in the federal Courts? And the answer is: it does, if Congress had the power to confer it. The second: Had Congress the power to impart this right as a corporate franchise?—was answered in the affirmative.

The inaccuracy of assuming, that this statute conferred jurisdiction on the Court, is shown by the other clause, which empowers the corporation to sue in State Courts, who derive their authority from the States, and to whom the Government of the United States could give no judicial authority; and also by the reasoning in *U. S. Bank* v. *Devaux* (cited ante), in which it was determined that the charter granted no jurisdiction to the Court, but only operated to give capacity to the corporation to appear, as a corporation, in a Court which would, by law, have cognizance of the cause, if brought by individuals. "If jurisdiction is given," says the Court, in dismissing the proposition, "it is equally given for all sums, however small they "may be."

These two cases, then, decide, not that the statute conferred any new jurisdiction on the Court, but that, creating the corporations, they conferred on them some of the franchises which citizens would have possessed, and which, but for the statute, the corporations could not have exercised.

SECTION LXI.

Ex Parte Cabrera, 1 Washington Circuit Court Reports, 232, was a case where a person, attached to the Legation of Spain, being confined under process from a State Court, was brought before the Circuit Court on a writ of habeas corpus, and sought the intervention of that court, under an Act of Congress, that all State process against the person of any public minister, or of his domestic, shall be deemed null and void.

The decision is in a nutshell (p. 236): "This law is not "less obligatory on the State Courts and State Judges, "than upon those of the United States. If a public min- "ister be sued in the latter courts, it will be the duty of "those courts to quash the process, as altogether void. If "he be sued in the former, that court is equally bound by "the same law to give the same decision. The injured "party may also have redress against the aggressor, in "either court, or may prosecute him under the 26th Sec- "tion of the law. It is one thing to declare the process "void; but, another to define the tribunal which is to de- "cide. The natural tribunal is that, where the process is "depending, or which has the superintending control over "said courts."

We have seen that the court, in possession of the cause, has the exclusive right to decide whether it has jurisdiction, or not (ante—). And, as that is all there is to be decided, the chance expressions, thrown into this case, are not adjudicated.

United States v. *Bevans*, 3 Wheaton, 336. The decision was, that a murder, committed on a bay within the juristion of a State, was not cognizable in United States Courts. That, though it was competent for a government, which possesses the broad power of war, "which may provide and "maintain a navy," which "may make rules for the gov- "ernment and regulation of the land and naval forces," to punish an offence, committed by a marine on board a ship of war, wherever the ship may be, it had not exercised the power. This case refers the power of Congress, in the premises, to an entirely different part of the Constitution from that of ordinary Courts.

SECTION LXII.

Thus we find, that the four cases upon the common law jurisdiction of the Court in criminal cases, have settled nothing;

That an Essayist attempted to reconcile them, and produced an argument, which, being introduced to every lawyer in the country, while he was young, unreasoning and pliable,—formed the common prejudice of the bar, upon a theory devoid of foundation in authority;

That the cases, based on the rights of assignees of choses in action, are referable to an entirely different clause of the Constitution, and that the statute operates to regulate commerce, instead of limiting the power of the Court;

That the case of *Kendall* v. *The United States*, mentioned *McIntire* v. *Wood*, and *McClung* v. *Silliman*, merely to take a distinction between them and the case at bar, and adjudicated nothing;

That the case of *Cary* v. *Curtis*, which at first seems very strong against us, runs out entirely, and expressly states that but one question was decided, and that was, as to the merits of the defence interposed;

That the two United States Bank cases do not decide that the statutes conferred any jurisdiction or power on the Courts; but that they imparted a power to perform a particular act in a particular manner, to a corporation, which had no power to act, at all, except that derived from the Act;

That the case of Cabrera was already in a forum, over

which the Circuit Court had no supervisory control, and could not have; and that of Bevans was cognizable by a State, and only capable of being brought under the judicial power of the United States, by regulations to govern the land and naval forces.

And this leaves *McIntire* v. *Wood*, and *McClung* v. *Silliman*, the only cases in which the Constitution is referred to; and these we have discussed in Sections 30, 32, 36, 37 and 39, ante, and have shown them utterly irreconcilable with numbers of cases, which are regarded as sound law, to-day, and the principles on which they are based. These cases of McIntire and McClung are, like the case referred to in *Marbury* v. *Madison*, to be understood to have decided that a mandamus ought not to issue in that case, and to have settled the merits of all like cases.

SECTION LXIII.

The foregoing are the cases which are referred to in discussions upon this power, and are the only cases in which the constitutional grant of power has been denied. And it will be seen that the single case of *McClung* v. *Silliman* is the only one, in which the opinion and decision of the Court claims, or purports, to be based on the doctrine, that the Constitution vested judicial power in Congress, which it may delegate or refuse to the Courts, at its pleasure.

These cases, evidently, had no argument, and no careful consideration of the Court. For, if the principles and precedents, by which the Constitution is and must be construed, had been before the Court, at all, they could not be ignored and the entire power made out by a single inference. And in the face of, and to balance these exceptional cases, we have presented many, carefully examined cases, utterly inconsistent with and, sometimes, in words directly opposed to their doctrine.

As both cannot be the law; and as the reasons, given in the cases we have first presented, are cogent and conclusive, and never questioned in any case,—we are brought to the conclusion, that it is the settled law, that the power of the Courts inferior to the supreme Court, is vested in the system by direct grant from the people. And that, when the people granted to Congress the power "to make all laws "which shall be necessary and proper for carrying into "execution the foregoing powers and all other powers, "*vested by this Constitution* in the *Government* of the "United States, *or in any department or officer* thereof," they, by necessary implication, forbade Congress to make

any law to hinder the carrying into execution of any power, granted to the government, or to take away from the government any means necessary to carry the Constitution into effect.

That when—to secure liberty, establish justice and insure domestic tranquility—the people made the law, that no man should be deprived of his property but by the judgment of his peers, or the law of the land, and provided means for its enforcement,—and the Government has, in its judicial department, actually had and exercised the only means capable, under some circumstances, of enforcing the law—they, by granting to one department power to make laws to carry this power of government into effect,—forbade that department to prevent the execution of the power, directly or indirectly, by sacrificing the end and object, through the means.

And the statute, which virtually forbade the Government of the United States to entertain this suit; as well as that, which repeals, and would take away from that government, the power to adjudicate causes, arising solely under the Constitution and laws of the United States, being authorized neither among the enumerated powers, nor among those *necessarily* implied therefrom—are without authority.

SECTION LXIV.

In the face of these principles appears, finally, the case of *The Provident Insurance Co.* v. *Ritchie*, 5 Wallace, 541. Its existence, and presentation as the basis of this motion, have required the full examination of the question from its foundation; and, in view of the principles developed, it now behooves us to reconcile the case with our determination, if we can.

The first point observed, in reading the case, is, that it is decided solely by collation of statutes.

(Second): That the Constitution is not mentioned in the case, in any form.

From which it appears that no argument, in support of the jurisdiction, was made, except upon the language of the statutes; for, had the constitutional delegation of jurisdiction to the Court, as belonging to an independent department of the Government, been seriously pressed, it could not have been overlooked.

It is frequently stated, by the Supreme Court, as well as by the Appellate Courts of the several States, that it approaches constitutional questions with reluctance, and will very rarely, or never, raise a constitutional question against the validity of a statute, where it is not raised by counsel in argument. Hence it follows, that a case, based upon the construction of a statute, is not a precedent in favor of its constitutional validity.

We have seen how the *argument*, quoted by KENT, has colored the ideas of every law student, for nearly fifty years, and had probably laid the foundation of the im-

pressions of most of the Judges, as well as the counsel. The undue prominence given to the isolated expressions upon surrounding subjects in many "mild" law books, whose authors, making very fair compilations, look wise, and speak, like parrots, the words and uncomprehended sentences of other men,—has also done much to continue the hasty or superficial examiner, in the same idea,—that it was adjudged and settled law. And, as the point seems, in this case, to have been sprung in the Supreme Court, at the final hearing,—the fact, that the constitutional question was not raised, is accounted for on the most natural principles.

As the constitutional question was not raised or considered, *and was not decided*,—the case is not a precedent against us, standing on our constitutional guaranty and the constitutional power of the Court alone.

SECTION LXV.

To and including Section LXXIX, the argument is based on what were, until after the virtual dismissal of these Bills, the secret constructions, and regulations of the Commissioner.

I believe that the pleadings in this case are broad enough to let in this argument, and to entitle the plaintiff to an injunction which shall prevent the enforcement against him of the regulations upon which the following cases arose.

In the latter part of 1868, or early part of 1869, the Commissioner made a rule, that when the Assessors estimated the producing capacity of a distillery, they should find the fermenting capacity in gallons, and every 45 gallons of fermenting capacity, should "represent" not less than one bushel of grain, and every bushel of grain should represent 14 quarts of proof spirits.

By this rule the capacity of the tubs was ascertained in gallons:—this divided by 45 produced the number of bushels:—which divided by (14 quarts) 3½ would give the number of proof gallons the distillery would produce in the fermenting period,—and being divided by 2, 3, 4 or 5, the number of days the distiller designed to ferment the mash with one day added for the time the statute required the tubs to remain empty would produce the daily "producing capacity."

In the latter part of 1869 a regulation was made public that all distillers must ferment in two days, and that the "producing capacity" should be estimated on this basis after January 1, 1870.

It was said that this was done to compel Western distillers to stop, and enhance the price of spirits. But whether the motive was corrupt or not has never been shown; the regulation was *repealed* by the Commisssioner, about the time of its enforcement.

Under these regulations in February, 1869, the Assesor of the Chicago District assessed J. A. VanBuskirk for "deficiency," or difference between the amount produced by him and 80 per cent of the producing capacity as estimated.

In March as the collector was proceeding to collect this assessment, Mr. Monroe and myself, as counsel, filed a bill for an injunction, and the Court required a stipulation to be entered, that nothing should be done till the motion for injunction could be heard.

That motion was never argued, but in June, the United States brought suit on VanBuskirk's bond: Alleging as a breach, that he had not paid the tax on 80 per cent of the producing capacity of his distillery as estimated.

To this, *a plea* was interposed that he had paid the tax on all that he had produced: And the United States demurred.

Five other like suits were brought at the same time, and came up for argument under the same state of pleadings in November, 1869, the case of *The United States* v. *Singer & Bickerdike*, being the first in order; and in January, 1870, the Circuit Court delivered an opinion, against the United States, which determined the cases upon their merits; and the United States attorney has brought one or more of the cases, as a test case, to this Court.

Meanwhile, in August, 1869, the collector of the 2d collection district of Illinois, proceeded to collect a like defi-

ciency against Parker R. Mason, who filed a Bill in the Circuit Court for the Northern District of Illinois, and an order was made, requiring all proceedings to be stayed, until the motion for injunction could be heard. And in March, 1870, after it had been decided that the distiller was not liable, as above shown, the collector at Chicago, was proceeding to collect another like assessment upon Mason's still in Chicago, under these instructions from the Commissioner: "It makes no difference whether he has "produced the spirits or not, the tax must be collected."

Upon this, Mason filed his Bill, and a like order, as in the other case, was entered.

These two cases,

Mason v. *Mann et al*, and
Mason v. *Hart et al*,

both stated clearly that the plaintiff had paid all taxes due from him, on all that he had produced. And, for the purpose of removing all questions of fact, which might embarrass the question, required answers under oath, and offered no sustaining affidavits; so that any answer put in might be decisive.

Before the motions for injunction were brought to a hearing, the United States attorney moved to dismiss the bills *for want of jurisdiction.*

The following sections, to 79, apply to the particular facts shown in those cases, and are introduced here because they clearly illustrate the power of *legislation* and the oppressive *powers* vested in these officers by the statute, which form the subject of complaint in the bill, in the case at bar, and which, it was alleged in the bill, they threatened, and were proceeding to exercise.

SECTION LXVI.

The provision, adverse to this application, is found in the Act of July 13, 1866, Section 19:

* * * "and no suit, for the purpose of restraining "the assessment or collection of a tax, shall be maintained "in any Court."

We will take the English view; and this is *excepted out of the statute:*

1st. Section 1, of the Act of July 20, 1868, provides that there shall be levied and collected on all distilled spirits &c., a tax of 50 cents per gallon, to be paid by the distiller before the spirits are removed from the distillery; and the tax shall be a lien &c., *from the time said spirits are distilled* until said tax be paid.

Sec. 4, defines distilled spirits, and provides that "the "tax shall attach to this substance *as soon as it is in exis-* "*tence.*"

These are the only provisions of the statute which lay the tax of 50 cents per gallon.

Sec. 59, requires distillers to pay $4.00 per barrel, on each barrel produced * * *.

They do not lay a tax of any sort upon spirits, before their existence; nor is there any provision in them that makes any man liable for a tax on anything but proof spirits, or alcohol in some form of existence;—and that, which never existed, is not alcohol—is nothing—; these provisions do not tax that.

2d. Statutes, contrary to the law of nature and right reason, are void.

Dr. Bonham's case, 8 Co. Rep. 118.
Stockdale v. *Hansard*, 9, A. & E. 93.
Ham v. *McClews*, 1 Bay 93, South Carolina, 1793.
License Tax cases, 5 Wallace, 469.

It is unreasonable to fine a man for not producing or having skill, or to tax him on nothing, or for nothing.

Statutes should be construed in harmony with justice, reason and the Constitution; and, in order to support them, *must* and *shall* may be construed to mean *may*,—and the whole Section 20, may be considered as merely directory.

3d. Statutes, which abridge the liberty of the subject, ought to receive the strictest construction.

(Dwarris, 646.)

It is a well settled rule of law that every charge upon the subject, must be imposed by clear and unambiguous language. * * * Statutes, which impose a duty upon the public, will be critically construed with reference to the particular language in which they are expressed.

Dwarris, p. 646.
8 East., p. 245.

Where there is any ambiguity found, the construction must be in favor of the public.

A tax shall not be considered to be imposed, without a plain declaration of the intention of the legislature to impose it.

Dwarris, 646.
Dock Co. v. *Brown*, 2 B. & Al., 58.
Company &c. v. *Hustler*, 1 B. & C., 425.

In this case a canal Act directed that, no boat, navigating thereon, of less burthen than 20 tons, or which should not have a loading of 20 tons on board, should be allowed to pass through any of the locks, unless on payment of tonnage equal to a boat of 20 tons. Held that the clause did not impose a toll upon empty boats,—that the burthen must rest upon plain, unambiguous language.

The whole statute abridges the citizen's liberty, and, in terms, lays a tax on existing things, as above set forth; it could only be said to lay a tax on these deficiencies, these non-existent articles, by a most liberal construction of Section 20; and a liberal construction against the citizen, is not permitted. It is unjust to require a man to pay a tax on nothing, and unreasonable to charge such an one with heavy burdens; for, if he makes nothing, he has nothing to protect, and should pay nothing but the poll tax, by the law of nature.

This assessment is void on its face.

The tax is laid on nothing.

Section 20, is directory, only: not mandatory; and the assessor cannot follow the rule, unless he believes it will enable him, correctly to ascertain the amount produced.

The tax, based on the void assessment, laid on nothing, and without express words, equivocally, and charged by an arbitrary and false rule, has nothing to rest upon, and is void.

Ergo:

This injunction will not prevent the collection of a tax, but merely the exercise of arbitrary power under a false name.

English lawyers do not inculcate implicit obedience to

statutes which lead to absurd consequences or an infraction of natural law; they hold it inapplicable, and declare the particular case excepted out of the statute, even though the letter of the law be against them.

(Plowden) Dwarris, 484 and 623.

SECTION LXVII.

Section 13, lays a tax on the fermenting capacity, by bushels; Section 20 provides that 45 gallons of mash shall represent not less than a bushel of grain. By an almost extravagant liberality of construction, Section 13 may be construed by Section 20; but there is no provision of the statute, that a bushel of grain shall represent 14 quarts of proof spirits, or any other amount.

Yet, the legislature, by Section 20, declare the relation and proportion of these products to be within the scope of legislation; and, as Congress cannot delegate, to any man, its legislative power, and as it has provided no rule (even though it intended that 14 quarts should represent a bushel), but omitted this essential part from the solemnities of its enactment,—no such rule exists, and no levy, based thereon, is a tax.

Van Horne's Lessees v. *Dorrance*, 2 Dallas, 316.

SECTION LXVIII.

Even if this was a tax,—as the statute does not, in terms, require any person to pay it, but only requires the collector to collect, as in other cases of deficiencies,—it can only be charged on the plaintiff or his property, by an equitable construction, which is contrary to the well established rule of law, that "every statute, derogatory to the "rights of property, or, that takes away the estate of the "citizen, ought to be construed strictly; it should never "have an equitable construction:"

Sharp v. *Spear*, 4 Hill, 84.

Van Horne's Lessees v. *Dorrance*, 2 Dallas, 316.

Dwarris, 646:

—a rule, which has been reiterated in every State in the Union, in tax cases; and, in the 2,400 tax cases, reported, has never been questioned in its application to them.

SECTION LXIX.

The prohibition in question, and the actions of the department, where it was framed, rest upon a false dictum and a false assumption, that the legislature is absolute as to taxation; that taxes can only be imposed on the citizen by his representatives, and his representatives are his only defence: That by them he may be traitorously betrayed and despoiled, and the judicial power of the government made subservient to their will, or so throttled and hampered that it cannot defend him:

That the courts can be made an engine of tyranny, or a cypher, as the representatives may chose.

SEDGWICK, in his treatise on Statute and Constitutional Law, speaks of the power of taxation as, this *tremendous power of eminent domain*, before which every citizen lies prostrate.

And others, with what seems to me equally superficial examination, have spoken of it as a power, against which the only security is, that it is exercised by the people's representatives.

It is true that the cases, in the United States Courts, upon taxation by the United States, are few and far between. The first is *Hylton* v. *U. S.*, 3 Dallas, 171, which decides that, a tax on carriages is not a direct tax, but a duty or impost, and, being uniform, is a valid tax. And, as if to assert the right of the Courts to examine the whole subject, without reference to the fact that these taxes are laid by the representatives of the people,—the Court ignores the matter altogether, examines elaborately the general

subject, and supports the tax in question, on its general equity and uniformity.

The next is that of

Loughborough v. *U. S.*, 5 Wheaton, 317, which decides that the power of taxation by the Government, extends to all places within its dominions, as well to the District of Columbia and the Territories, which are *not represented*, as to the States which are; that *there may be taxation without representation*, but that, if the power is exercised, it must be in accordance with the rules of the Constitution, viz: if direct, in proportion to the census, and if a duty, impost or excise, it must be uniform.

And Chancellor KENT speaks of this paradox that, in the United States, taxation has no connection with representation.

Can it be contended that a citizen of a territory can be arbitrarily subjected to burdens, contrary to the law of nature, tyrannous, and against reason, by a power, in which he is not represented; and that the Courts can be divested of their power to protect those rights, which are absolute, inherent and inalienable—?

And if a citizen of a territory has a right to the protection of the Courts, has not the citizen of the State? There is nothing in these cases, from which the slightest doubt of the citizen's right to protection, against Congress, can be inferred.

If it is true that Congress can enact statutes in defiance of the Constitution, and can divest, or has divested the Courts of power to protect the citizen, then, indeed, we all lie prostrate, not alone before the power of eminent domain, but before a more tremendous power, an absolute and unchecked Assembly.

The limited department has grown absolute, and the absolute department has been destroyed.

Sec. 2, *Dallas*, 308, 310, 316, *A. D.* 1795.

SECTION LXX.

Further, if this could be a tax, it is invalid, for want of uniformity.

The excise on spirits manufactured, is 50 cents per gallon, and four dollars per barrel; and, to be uniform throughout the United States, it must be 50 cents on every gallon and $4.00 on every barrel produced.

Had the plaintiff produced 20 per cent. more than the producing capacity of his distillery, or, had he produced 16 quarts to every bushel of grain, the excision would have been 50 cents and $4.00. He produced about half that amount, and with this deficiency assessed, it makes the tax about 90 cents a gallon and $7.00 per barrel.

It will not do to attempt to evade this inequality, by saying, the State, or the collector, did not know that the amount was not all produced; that the statute fixed the amount on which the tax shall be paid, and, the assessment is based on the statute.

The United States cannot violate the spirit of the Constitution with impunity, any more than the State of New York; and cannot, by fixing arbitrary valuations, nullify the provision of uniformity.

In the "*Bank tax case*," 2 Wallace, 200, New York had fixed an arbitrary value on the property of the Banks, incorporated under State charters, and made them "lia-" ble to taxation, equal to the amount of the capital stock, " paid in, or secured to be paid in, and their surplus earn-" ings;" and this was held to be a tax on the property of

the Bank; and that, when that property consists of United States Bonds, the law, laying the tax, is void.

Now, this Section requires the assessor to ascertain whether the distiller has accounted for all the spirits produced by him, and provides an arbitrary rule therefor; and if the returns shall be for less than the amount thus ascertained, the distiller shall be assessed 50 cents per gallon and $4.00 per barrel, on such deficiency; but in no case shall the aggregate quantity, assessed, be less than 80 per cent. of the producing capacity.

New York said, we will lay a tax on the valuation, and ignore the property.

This Statute says, we will lay the tax on 80 per cent., and ignore the actual production, if less.

New York's tax was held void, because she could not, by any subterfuge, evade the fact that the property, and not the valuation, was the thing taxed.

And this must, likewise, be overthrown; because no subterfuge can evade the fact, that the whole tax is laid on the spirits produced, and not on arbitrary representation of them.

In the opinion, in the case of *the United States* v. *Singer et Bickerdike*, it is well laid down, that "it is not possible, "even for an Act of Congress, to make a bushel of grain "produce more spirits than nature has supplied, and sci- "ence and skill can extract;" and the conclusion follows, that, more than is produced, cannot be taxed.

SECTION LXXI.

But we deny, that this is a tax. We have already adverted to this position, and now return for a brief elementary discussion:

The word *tax*, in its general sense, includes all contributions, imposed by the Government, upon individuals, for the support of the State, by whatever name known, whether tribute, tithe, talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name.

Story on Const., S. 947.

For the derivation and original use of this word, as used in our law, see Lord Coke's exposition of Stat. 34. Edw. I., entitled: De Tallagio non Concedendo:

"No talliage, or aid, shall be taken or levied by us, or our "heirs in our realm, without the good will or assent of arch- "bishops, bishops, earls, barons, knights, burgesses and oth- "er freemen of the land."

"Tallagium, from the French *tailer*, to share, or cut out "and metophorically, is taken when the King or any other "hath a share or part of the value of any man's goods or "chattels, or a share or part of the annual revenue of his "lands, or puts any charge or burden upon another.

"Tallagium is a general word, and doth include all "taxes." * * *

2 Co. Inst., 532.

Taxes mean pecuniary contribution; performance of bodily labor, on the highway, is not "pay- "ment of taxes."

Overseers of Amenia v. *Overseers of Stanford*, 6 Johns, 93.

The word "Taxes" means burdens or impositions, put or set upon persons or property, for public use.

Matter of the Mayor of New York, 11 Johns 77, p. 80.
Sharp v. *Speir*, 4 Hill, 82.
2 Co. Inst., 532.

It would seem to follow, that any tax, laid on the citizen, without the intervention of property, is a direct tax; and any tax, laid on property or privileges, and required of the citizen only through his ownership or exercise, is an indirect tax.

It would also seem that there must be "subjects of taxation," "sources of revenue," in order that the tax may be taken for the support of the Government.

A poll tax falls directly,—and may only be collected directly of the citizen; but an impost upon land, a duty on imports, or an excise on manufacture, may be charged upon the land, import or manufacture, and the thing may be seized, or so much thereof as may be necessary to satisfy the due proportion, without any reference to the owner; yet, the tax falls indirectly on the owner, whether infant, feme covert, alien or citizen.

And there must be some persons and some things, not sources of revenue, nor subjects of taxation: a helpless idiot cannot be made a subject of direct taxation, nor a babe; yet, either may own property and be indirectly taxed through it; and the tax will depend on the accident of ownership.

Yet, Congress may lay and collect taxes, and make all laws, necessary and proper to do so.

Suppose, ten years ago, it had taxed all persons, black

and white, and had prescribed that all infants who had nothing, should be sold to pay the tax.

The provisions of the amendments to the Constitution, as to due process of law, did not extend to the Blacks, (*Dred Scott* v. *Sandford*, 20 How.). Yet no Judge would have admitted that the infant was taxable, or could be a source of direct revenue.

Nor can a tax be imposed upon a crime; a crime cannot be seized, neither can a tax be made out of it; no one can have a franchise in it, and it can only be remedied by a criminal prosecution.

It would appear, then, that these taxes cannot be laid on the crime of having the deficiency; and they do not purport to be.

But they are laid upon the deficiency, and that deficiency is about 10,000 gallons of spirits, which never existed; and that which never existed, is nothing; and nothing is not a source of revenue. Yet, this tax is either laid on nothing or on the plaintiff.

It must be a direct tax upon him, or must reach him through his property. If not a direct tax upon him, it lacks this essential element of a tax: *a subject of taxation.*

The subject of taxation was analytically discussed by Chief Justice MARSHALL, in delivering the opinion of the Court, in

Gibbons v. *Ogden*, 9 Wheaton, 199,—

in this manner:

"Taxation is the simple operation of taking small por-
"tions from a perpetually accumulating mass, suscepti-
"ble of almost infinite division.

"We are accustomed to see it placed, for different pur-

" poses, in different hands; and a power in one, to take " what is necessary for certain purposes, is not, in its na- " ture, incompatible with a power in another, to take what " is necessary for other purposes.

" Congress may lay and collect taxes, to pay the debts " and provide for the common defence and general welfare " the United States.

" This does not interfere with the power of the States to " tax for the support of their own Governments; nor is the " exercise of that power by the States, an exercise of any " portion of the power that is granted to the United " States." * * *

And, later, principles were laid down by the Supreme Court, in the case of

Dobbins v. *The Comrs. of Erie County*, 16 Peters, 435,

as follows (p. 446): " Married women and children have " privileges and protection, but they are not assessed, un- " less they have goods or property, separate from the heads " of families.

" The necessity for money for the support of States, fixes " the obligation on the citizen to pay taxes,— * * * " and the only sense in which a tax is a personal charge, " is, that it is assessed upon personal estate, and the pro- " fits of labor and industry. It is called a personal charge, " to distinguish it from the tax upon lands and tenements, " which are enforced without any regard to the persons " who are the owners.

" Taxes are never assessed, unless it be a capitation " tax, upon persons as persons,—but on account of their " goods, and the profits made upon their professions, &c.

" They are so imposed, because public revenue can only

" be supplied by assessments upon the goods, *i. e.*, the " estate and effects which every one hath.

" Taxes regard the persons of men, only because of their " goods. The goods, then, are taxed, and not the person. " But those who are to pay, are taxable persons, because " they are under an obligation to contribute, from their " means, to the necessity of the State.

" The obligation, however, only becomes a charge upon " the person, in consequence of the power of the State to " enforce the payment of taxes by coercion. This power " extends to the sequestration of the goods and imprison- " ment of the delinquent.

" A tax, according to the object upon which it is laid, " may be a personal charge; but that is a very different " thing from its becoming a charge upon the person in " consequence of the coercion which may be provided, by " law, to enforce the payment."

(The coercion is, to compel the citizen to separate the tax, which belongs to the State, from the balance of the property, which is his.)

The *Bank Tax case*, 2 Wallace, 200, already cited, and the cases affirming it, in 3rd, 4th, and 5th Wallace, affirm the doctrine that taxes are laid upon persons *or* property; and, if laid upon property, no false name or arbitrary assumption can conceal or alter the actual fund from which the government may compel the owner to separate it, or may itself take it, without reference to him.

This is not a valid tax; and, if not a valid tax, is no tax, for one or more of the foreging reasons, viz:

It is laid, or charged, upon no subject of taxation or source of revenue,—nothing.

As a direct tax, it is not apportioned by the census.

As an excise, it is not uniform.

It is exacted from the citizen, only by intendment and forced construction, and neither are permitted to take away the property of the citizen.

SECTION LXXII.

In this view this statute seems highly penal: If the distiller truthfully returns every gallon he makes, and is guilty of making less than 80 per cent of the capacity of his distillery, or 14 quarts for every bushel, a payment, proportioned to the deficiency is required of him. Because he has not produced the amount, this charge is required. If he had produced it, *it* could have paid the amount. Because he did not produce it, *he* shall pay an equal amount.

This, then, is a retribution, conditioned upon his not producing the amount required.

And as a penalty implies a command or prohibition (Dwarris), the failure to produce, is a violation of the law; and the proper mode of enforcing *its* penalties is, by criminal prosecution.

The word "penal" is defined: That which may be punished; that which inflicts a punishment.—*Bouvier Law Dic.*

And *a penalty* is, a retribution, conditioned upon the doing or not doing of an act, and is inflicted either by virtue of a violated contract or a violated law.

A *crime* is the violation of a law.

And the penalty for violation of law is, therefore, a penalty for crime

(See Armstrong's Foundry, 6 Wallace, 766.)

SECTION LXXIII.

Congress has no power to require the distiller to produce 14 quarts, or any amount arbitrarily estimated, as the capacity of the distillery.

The authority of Congress to regulate commerce, between the States, and with foreign nations, is exclusive; and the States are without any authority on that subject.

Gibbons v. *Ogden*, 9 Wheaton, 1, pp. 199, 200, and the converse must be true; that the power to regulate the domestic trade and internal policy of a State—a power reserved to the States, and not granted to Congress—, is exclusive in the States; and Congress has no power over it.

And this doctrine is settled by the License Tax cases, 5 Wallace, 470 and 471, and

Pervear v. *The Commonwealth*, ibid., 477.

That this matter of production is within the authority of State regulation, needs little argument: The production of large amounts of spirits from grain, infuses large amounts of fusil oil and other matter deleterious to its quality, and the rapid distillation materially depreciates its value for many purposes. Inspection laws and provisions, on this behalf, are legitimate subjects of State authority.

The hours of labor and the amount of grain, which may be permitted to be used for these purposes, are also within its province; and, in a time of scarcity, I believe there have been instances where the quantity, so used, was limited by State statute; and further, the State might require the distiller, under penalty, to produce a given amount from every bushel.

It is not a case of concurrent jurisdiction,—for both cannot exercise it; and if the power to regulate resides anywhere, it is in the State.

SECTION LXXIV.

Webster defines *an excise* to be, an inland duty, impost or tax, laid upon articles *produced* and consumed :

Also, on licenses to deal in certain commodities.

Burrill Law Dic.
Wharton Law Dic., and
Blackstone and Stephens unite in this definition.

And Webster defines *a tax* to be, a rate or sum of money assessed on the *person* or *property* of a citizen, by government, for the use of the nation or State.

And no amount of search can, in my opinion, find any authority to weaken or vary either of these definitions.

Now, if this is a tax laid upon the *person* of the plaintiff, the Constitution, Art. 1, Sec. 9, 3, strikes directly at its root : " No capitation, or other direct tax, shall be laid " unless in proportion to the census ;"—and this is in proportion to deficiency.

It is not laid upon property, for that never existed.

It cannot be an excise or impost, for they are only laid on things produced,—and this was not produced.

Nor is it a duty ; for, that is laid only on imports and exports.

If a tax is laid, it is laid on the plaintiff ; and that is a direct tax.

But is it a tax ?

" A rose would smell as sweet by any other name," and

a tax, possessing all the inherent qualities of a tax, could be collected as a tax, by whatever name it is called.

Therefore, we will present parallel enactments:

Every distiller, who shall fail to produce 14 quarts of spirits from each bushel of grain, shall forfeit and pay to the United States, 50 cents per gallon upon the amount of such deficiency.

Every distiller, who shall fail to produce 80 per cent. of the producing capacity of his distillery, shall be fined 50 cents per gallon, for every gallon of such deficiency; and all such fines and forfeitures shall be assessed by the assessor of the district wherein such distiller resides, and shall be collected by the collector, by distraint, or otherwise, as the necessities of the case may require.

Every distiller, who shall fail to produce 80 per cent. of the capacity of his distillery, shall pay, to the United States, the sum of $1,000; and, at the expiration of each month, the assessor shall ascertain the producing capacity of the several distilleries within his district, and shall enquire and determine, whether or no, the several owners thereof have produced 80 per cent. of such producing capacity, and shall issue a warrant to the marshal or collector of such district, against any distiller whom he may find delinquent, commanding him to make, levy and collect the sum of $1,000 by distress of goods, imprisonment of body, &c.

Every distiller, who shall fail to produce 80 per cent. of the capacity of his distillery, shall pay, to the United States, the sum of $1,000; and all grand juries shall enquire thereof, and courts shall try all indictments found

therefor, and shall pronounce sentence, and issue execution therefor.

These, all, have the same characteristics; and the characteristics determine the name they ought to bear, and the proper mode of collection.

The name of *penalty* covers every quality; the inquiry by the grand jury is the only one which appears clearly proper; and, if the action of the criminal court is proper, no other tribunal has jurisdiction.

SECTION LXXV.

Upon the argument of the cases of

The United States v. *Singer & Bickerdike*,
The United States v. *Furlony*,
The United States v. *Van Buskirk*,
The United States v. *Hollihan*,
The United States v. *Park*,

the Court propounded the following quere?

Can the legislature say to distillers: We lay a tax on what you produce. It is difficult to find how much you really produce; therefore, our agents shall, from time to time, estimate how much you can produce, and you shall produce and pay the tax on 80 per cent. of these amounts, or stop—?

To which I answered: 1st. It cannot;

2nd. It has not;

and, on the first answer, said:

It is adjudged (*Bank of Commerce* v. *New York City*, 2 Black., p. 634 and 635, affirming the doctrine of *McCullough* v. *The State of Maryland*) that—delicate as is the dividing line between State and national authority to regulate business—it is ascertained by the extent of sovereignty, and that, when the limit is ascertained and fixed, all perplexity and confusion disappear. "Each is sovereign in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised."

It is further adjudged (*Pacific Ins. Co.* v. *Soule*, 7 Wal.

lace, p. 444), "that the national Government, though su-
"preme within its sphere, is one of limited jurisdiction and
"specific functions. It has no faculties but such as the
"Constitution has given it, either expressly or incidentally,
"by necessary intendment. Whenever any act, done un-
"der its authority, is challenged, the proper sanction must
"be found in its charter, or, the act is *ultra vires* and *void.*
The test must be applied in the examination of the ques-
tion before us.

Congress has power to regulate commerce between the States, and with foreign nations, and the States have no authority over it, whatever; "but over the internal "commerce or domestic trade of the States, Congress has "no power of regulation or direct control" (License Tax cases, 5 Wallace, 470); "this power of regulation is ex-"clusive in the State."

The right of taxation in Congress, is not inconsistent with the right of the State to regulate; but Congress must lay its tax on existing subjects. It cannot call them into existence in order to tax them. (Ibid., p. 471.)

All this has been adjudged in terms; and it follows that, as Congress has no power of regulation, or direct control, every regulation must be such as is strictly incidental to taxation,—and so it is also adjudged.

And it follows that the question, *whether the tax can be laid on the basis, named* in the quere, is the only one before us.

We have proved by arguments, which have not been attempted to be met, that the tax must be laid on something; and the Supreme Court have affirmed as a fundamental rule, that the tax must be laid on existing things. (5 Wallace, 471.)

To support an affirmative answer to the quere, the estimate of 80 per cent., under the rules fixed by Congress, must be *conclusive evidence* of the amount produced; for, if not conclusive evidence of the fact, the real facts would have to be examined, and the excise laid in accordance with them, to be "uniform;" and if not uniform, it would be void, in toto.

And the question resolves itself into this:

Can Congress fix an arbitrary rule, of conclusive evidence, as to the amount produced? The answer is negative.

1st. The Legislature may require a judicial tribunal to receive evidence, excluded before; may require the hearing of matters as evidence, which were not evidence before. But it cannot weigh evidence, and decide what a jury or a court shall believe, where evidence is conflicting. This is an attribute of judgment, a judicial act; yet, this is just what the legislature would do, by prescribing *conclusive evidence.*

In the case at bar, it is admitted, that the amounts reported are all that the party has produced; if put in issue, it would have been proven beyond the possibility of a doubt. Yet, the estimate of 80 per cent. of capacity, if conclusive evidence would require court and jury to return, as their verdict and judgment, that which had been proven, beyond the possibility of a doubt, to be false;—and the trial would, in fact, be not by court or jury, but by the Legislature, and that, without hearing or evidence.

2d. The practical result of such an arbitrary rule is, to place the Constitution in the power of Congress.

For, if Congress can suppress the real facts, and make

its edict conclusive evidence that false bases of taxation are true, it may ignore real uniformity altogether.

Only the Courts can construe statutes: the judicial department alone can decide whether the fundamental Statute, commanding uniformity, has been violated; and the Legislature cannot wrest the decision, directly or indirectly. The whole judicial power of the United States is vested in the Courts; and no power to control their judgment, directly or indirectly, was ever given to Congress.

The distillers might answer the legislature:

"You lay a tax on what we produce. We report what we produce, and pay your tax. You say we lie, and, it is difficult to find what we produce:—the issue is fairly joined; and the presumption is, that we are not guilty. You are a party, and cannot be a judge in the cause. Submit the cause to the courts, or to assessors, chosen so as to be unbiased, and sworn to try the issue and a true verdict give, according to the facts. There is some difficulty in this; and the Court or assessor, unbiassed by arbitrary instructions, may find the facts against you; yet, the difficulty is only such as is necessary to the protection of the rights of freemen.

In our quere, Congress says to the distillers: "*You must produce, and pay the tax on*, 80 *per cent., or stop.*"

It cannot regulate or directly control them, and can only stop them for a failure to pay the tax, or do their duty under the law.

It is not their duty to pay the tax on 80 per cent. unless they produce it, for that would not be uniform excision; therefore, it is necessary that Congress require them to

produce that amount, if it requires them, under penalty, to pay it. "*You must produce*," is no less than regulation and direct control, which is beyond the power of Congress. (5 Wallace, 470.)

It is bringing a thing into existence, in order to tax it, and contravenes the principle laid down, "Congress must lay the tax on existing things." * * * * "It cannot "bring a thing into existence, in order to tax it. If Con- "gress had the right to regulate, it might regulate by "licenses, or any other way, as well." (5 Wallace, 470.) If it had the power to call the subject into existence, the tax might be a royalty, or bonus, and not a tax; and no uniformity would be necessary; but,—we have seen that it has no such rights.

Then, the only manner in which the quere could be answered in the affirmative, would be, by saying that, as Congress had imposed the rule, any one who runs his distillery, started it with his eyes open, *cum onere*; and if he will not bear the burden, he may stop.

1st. This contravenes the right of every man to acquire, possess and enjoy property.

To acquire: by all lawful trades and vocations, which he may exercise, as parcel of the common liberty of every man, subject only to such regulation as is exclusively within the authority of the State Government.

To possess and enjoy: in using it to acquire other property,—for experiments,—in running one day, and stopping the next, and producing from it such results as of his own free will he may determine:—this is free enjoyment.

2d. The effect of this *cum onere*, appears first in these cases: Each distiller had acquired and possessed his respective distillery, before the passage of this Act; and

it is now proposed to forbid the enjoyment of their property, except *cum onere:* with the burden of a regulation by Congress, which, it had been adjudged (ante), Congress cannot make.

If we admit—what was not the fact—that these distillers were not enjoying their property, in using it in pursuing their lawful trade within this State, at the time of the passage of the Act, but were sitting idly, and only started after obtaining the license and voluntarily placing themselves under the control of the Act (a proposition false in every particular), we should have an instance parallel to any other divestiture of liberty by Congress, and a subsequent assumption of the maimed franchises *cum onere*, or of any other instance of a citizen releasing his individual absolute rights to Congress, by implied contract.

Thus, if a citizen,—being abroad, having learned that Congress had abolished the trial by jury, on account of the difficulty attending the trials, and the uncertainty of their results,—should return, he would come *cum onere*, and the statute would be valid as to him, because he vol untarily entered its domain.

Or, better still: The citizen at home begets a child, *cum onere*, and posterity is deprived of constitutional liberty by an implied contract.

Or, better still: should Congress enact that every person, who shall hereafter purchase land from the United States, and settle thereon, shall be debarred from the trial by jury for crimes against the United States—would any man buy *cum onere?*—Most certainly not.

The Government was established to preserve the blessings of liberty to the people and their posterity. No individual can contract away his inalienable rights; and no

authority was ever delegated to Congress, or any department of Government, to become a party to such a contract; therefore, the contract must fall for want of parties.

1. We have seen, by the License Tax cases, 5 Wallace 470, and Pervear v. The Commonwealth, ibid. 477, that the imposition of a license tax and the issue of a license by the United States, does not, and cannot authorize a business, forbidden by a State, or, under State regulation required to be exercised in a particular manner and under certain regulations, only; that the taxation is the simple operation of taking a certain share from the profits of the business, if exercised, but does not imply authority in the general Government to supersede, in any manner, the complete authority of the State over the business, exercised within it.

2. We have also seen, in the Bank Tax case, 2 Wallace, 200, and the other authorities, cited in argument, that taxes are laid upon persons or property; and, if laid upon property not taxable, or upon a valuation or estimate, made to evade or remove the difficulty in finding the actual property, which must, in fact, bear the burden,—such levy and such attempts to remove the difficulty, must be futile, and the levy must be void;—that the property itself is the thing that must be reached, and, if not taxable, the arbitrary valuation cannot evade or remove the difficulty, and make it so.

Now, what difference does it make, if, when we go behind the arbitrary valuation, we find United States bonds (which are for purposes of taxation, nothing) or (literally) nothing? The subterfuge of arbitrary valuation cannot make the bonds, which are nothing taxable into something taxable; nor can it make nothing at all, into something.

But this Bank Tax case is still nearer ours: In going behind the arbitrary valuation, it was found to represent and be composed of some property, which was taxable, and some United States Bonds, which were not taxable. And we, going behind the subterfuge, by which it is attempted to evade the difficulty, find some spirits produced, which are taxable, and some non-existent, which are not taxable.

The Supreme Court held that the subterfuge could not fasten the tax on the untaxable bonds, and as to them the statute was void; or, that the State could not compel the owner to pay a sum equal to the tax on the taxable and untaxable property, by any name.

And the principle covers our case, and takes the untaxable non-existent articles out of the operation of the statute, and makes the statute, requiring the distiller to pay the amount, void.

The query is answered;—Congress *can not*.

To make assurance doubly sure, we show that Congress *has not:*

SEC. 1. Requires the distiller to pay 50 cents per gallon, on every gallon "produced." Nothing in the Section goes beyond the actual production.

SEC. 59. Requires the payment of $4 for each "barrel produced," and says nothing about any other.

SEC. 13. Lays a daily tax upon the capacity, of 10 cents a bushel, that is, 10 cents on every 45 gallons of fermenting tubs.

All these provisions tax existing things.

SEC. 20. Is the one that attempts to tax the deficiency which does not exist; but it does not succeed. The District Attorney expressly disclaimed all argument, and told us there was a hiatus, a chasm, between the 45 gallons of beer and the spirits. The Legislature have left out some words; the Court cannot supply them. (Dwarris 578 & 598).

The hiatus is evident: The Assessor is commanded to ascertain whether the distiller has accounted for all the spirits produced by him; and, to determine the amount, the quantity of the materials used, shall be ascertained, and 45 gallons of beer shall represent a bushel of grain! That is as far as the Section goes. There is a whole Section left out; the chasm is apparent, and it is absurd to try to connect together two clauses of a statute that evidently refer to different things.

The Assessor is directed to ascertain the materials used; 45 gallons of beer to represent a bushel of grain. The next words are: "In case the return of the distiller shall "have been for less than the quantity thus ascertained." Construe the parts together, and it reads: "In case the "returns (of materials used in the preceeding month, made "under Section 19) shall be less than the quantity (of mate-"rials) thus ascertained (by estimating 45 gallons of beer "as a bushel) the distiller shall be assessed for such defi-"ciency, at the rate of 50 cents for every proof gallon."

Now, as the deficiency is in the materials, i. e., grain used, it is evident that this tax is to be assessed, 50 cents on each proof gallon of the grain used.

A proof gallon is not defined in this Act; though, as proof spirits is, we may suppose, that a proof gallon means a gallon of proof spirits, but do not know; and this Section, if to be construed together, clearly refers it to grain.

The next clause involves us in hopeless absurdity; and, unless we can fill the hiatus and tell how much spirits Congress intended should represent a bushel of grain, we can but guess at its intention.

The statute nowhere states what amount of proof spirits shall represent a bushel, and we have no hint even at the intention.

The Commissioner has assumed 14 quarts as the representative, in estimating the producing capacity; but it is evident that 14 quarts was not intended to be interpolated in this hiatus; for, the Assessor is only required to bring the estimate up to 80 per cent. of the producing capacity. Thus, if the fermenting capacity is 100 bushels per day, the producing capacity is 1400 quarts per day, and 80 per cent. of this is 1120 quarts per day; and it would seem that Congress intended that a bushel of grain should represent not less than 11.20 quarts of proof spirits.

Further, the break is so short, and the commencement so abrupt, that we have no right to assume that Congress intended to do as the Commissioner supposes. It would be equitable, and in accordance with sound justice, for Congress to supply a rule for estimating the true producing capacity of the distillery, from the grain actually used, viz: the amount of spirits which the distillery was capable of producing from the materials actually used, considering

all the favorable and unfavorable circumstances which surrounded it.

And this seems to have been the intention; for there is no requirement that he shall refer to the abstract survey, but to the materials actually used.

In making the estimate,—the notice of the distiller,—the abstract producing capacity, ascertained by the surveys,—the books of the storekeeper, and other matters furnished by the statute, would be of great assistance: And from all these aids the assessor might estimate what, under all the circumstances, the distillery might be fairly expected to have produced. He shall then form his judgment of how much it did produce, and assess the deficiency. But the last clause of the Section provides that, as the assessor may be inclined to indulge his doubts, and lean towards lenity (?) too much, he shall not allow them to carry him more than 20 per cent below the amount he has estimated as fairly to be expected from the grain actually used, and the circumstances surrounding the particular case.

This supposed Section would make the statute, in this particular, clearly constitutional, just and reasonable, careful of the citizens rights, yet, obtaining the entire due of the government.

And, as we must construe statutes, where the words will permit, in harmony with the Constitution, justice and reason, we must certainly suppose the Legislature intended to fill the chasm with a provision, which would make the statute constitutional, reasonable and just. What the provision would be like, we may suppose. What it would have been, we do not know. Therefore, the matters, which were evidently intended to hang upon it, must fall; and Section 20 is void, for uncertainty.

SECTION LXXVI.

Recapitulation.

In this argument we have scouted the construction (read on the argument), put by the Commissioner on Section 4: That, because the disagreement of the Courts in different parts of the country, as to the proper construction of the Acts, frustrated the uniform enforcement of them, therefore Congress intended to enable the *Internal Revenue office* to control the construction.

Congress never intended to divest the Supreme Court of the authority to adopt the true rule. That Court is always open to the appeal of the United States, and Congress never intended to transfer its functions and judicial authority to a subordinate executive officer. There would be no excuse, not even that of urgency; for, Congress could have required the Court to give precedence in such matters, above all others, and thus have secured a decision as early, at least, as the *Internal Revenue office* gives it.

The District Attorney, in argument, agreed in this view; and I would pass it, but that another step is taken by the department, on the assumption that it has the judicial right to determine the true construction of the Act. This is found in the following printed slip:

"To Distillers."

"A case of considerable importance to distillers has just "been decided at the Bureau of Internal Revenue. W. "O. Watts appeared for certain Western distillers to claim "abatement of deficiency tax, levied because the distillery "did not produce eighty per cent of its surveyed capacity.

"It was proved to the satisfaction of the department, that "the owners had acted in good faith, and had worked as "many days as possible under the circumstances.

"The decision was, that, every effort having been made "to comply with the law,—while under the ruling and "practice of the department it did not furnish ground for "abatement,—it formed a basis for asking a compromise; "and under this a compromise was effected, reducing the "payment to $18,000, and the dismissal of a suit for re-"covery, already instituted."

Congress may lay taxes, subject to two unbending conditions: Direct taxes must be proportioned to the census; excises &c., must be uniform.

This judicial authority decides what is the law; and then, as an executive officer, proceeds, not to execute it, but to compromise, or sell immunity.

It decides what is uniform taxation, and then proceeds, deliberately, to destroy the uniformity, by accepting less.

The position is monstrous. If the defendants are bound to pay, every man is bound to pay, by the same rule; and the Commissioner may not enforce a suit against them for the whole amount, and sell out to others, according to such rules or caprices as may, at the time, please him.

We scout the proposition, but use the instance to show, that even the Executive believed, with us, that Congress did not intend to make an unvariable rule, that a distiller, who had paid on all he had produced, should pay on the arbitrary amount which the Commissioner has fixed.

In the argument we have shown that, by well established rules of construction, our case is excepted out of the statute, whatever meaning its language may appear, at first, to convey.

That, by equally well established rules, all ambiguities must be construed in favor of the citizen; and that the ambiguities are many.

That the construction must be strict against the United States,—liberal in favor of the citizen;—that the intention of Congress must be taken most strongly against itself, and in favor of the citizen; for, Congress is ever at hand to make its intentions clear, while the citizen has no remedy.

That, by the Constitution, if Congress has commanded' the *sic jubeo* is void; and on this, also, the decision must be in strictness against Congress, equitably for the citizen.

This branch includes: the collision of authority between State and National legislation,—the construction of the grant to Congress,—the question, whether this is penal; and also the point, that the rule, established here and now, will be the rule for this Court hereafter. And the rule, as to what is conclusive evidence of the amount produced, runs through, not only suits in debt, but suits for forfeitures and criminal proceedings.

In all cases where the amount is less than $2,000, and all criminal proceedings, this is *the highest judicial tribunal* in the land. And your Honor's decision is beyond the review of any tribunal, in any event.

With the dignity and great power are coupled, also, the heavy responsibility of protecting the citizen. It can no longer be said that a "District Judge" places himself in antagonism with Congress; but, that the Court of last resort—the tribunal, designated by Congress for that purpose, has accepted the responsibility with the honors,—has pursued the invariable rule that *the law favors liberty* (Dwarris, 674),—has obeyed and been bound by the supreme law of the land, and has not dared to withdraw its august power from the protection of the citizen and the fundamental law.

SECTION LXXVII.

THE THREE CO-ORDINATE DEPARTMENTS—THE JUDICIAL PROVINCE IN SUCH CASES.

The principle is well settled, that, in this country, the three departments of government are co-ordinate; each derives its authority from the Constitution, and for its acts within the powers delegated by the Constitution, it is answerable to the people, and to them alone. (2 Dal., 308-9; 3 Dal., 399, and cases, cited ante.)

Wherever discretion is committed by the Constitution, to any department or officer, things done in the exercise of that discretion, are only politically examinable. (1 Cranch, 170.)

But this is as far as the principle extends, and its statement implies the postulate, that acts done, without the powers delegated, are examinable in another forum.

It is upon precisely this distinction that Courts constantly act in regard to legislative acts. If the act is within the discretion, delegated to the legislative department, the Courts have nothing to do but to expound it, and give it effect: but, if it is not within the discretion delegated, they declare it void,—not *ex cathedra*, or by an imperial *rescript*, but, only in the sphere of their duty, when, in administering justice distributive, the individual, wronged by the execution or existence of the act, prays the remedy. (And this is the very reason why the Courts do not raise constitutional questions. It is only when the parties claim that they are wronged by the statute, that the Courts are called upon to examine the complaint.)

It is the duty of the executive officers to execute the laws. So long as that department continues within the limit, it can commit no injury.

If, however, a specific duty is assigned by law, and the officer, under color of that duty, does another act, not assigned, he and his act are not protected by his office. (1 Cr., 170.) So, if he attempts to execute an unconstitutional law, or one in part unconstitutional, *it is clear that the questions are not politically examinable, because the right to question whether it is politic, or not, to disobey the Constitution, is inconsistent with the existence of the Constitution itself. And, the question not being one of policy, or of discretion, if any person's rights are invaded by the act, it is within the judicial power of the Government to take cognizance of his complaint*, and, deciding what is the law, and that the injurious act is not warranted by law, to forbid it, and give a remedy to the injured party.

The statute being decided unconstitutional and void, and the act without the powers, committed by the Constitution to the Government, it is no longer an act of Government; and as the Court has jurisdiction of the private individual who is doing the act, it proceeds with a complete remedy against him.

SECTION LXXVIII.

But it is said that *the Government* has concluded that it cannot permit itself to be interfered with in the collection of its revenues; that private right must give way to it, and cannot be noticed.

The inaccuracy of the expressions used, first strikes us: "*The Government has concluded;*"—Who is the Government?—The Executive?—it will not for an instant be claimed that he is the Government of the United States.

The legislative department?—hardly; for in it the whole legislative power, even, was not vested (2 Dal., 411), and no powers, not legislative, were given; yet, such powers are absolutely necessary to Government.

The Judicial department has always denied that it was the Government.

As neither department constitutes the Government, the next inquiry is: Do the three, together, constitute the Government?

No legislative powers were granted to the executive or judicial, and but part only, of the legislative power of the United States was vested in the legislative department; therefore, these three departments do not constitute the Government.

Those powers, not vested, reside in another law maker.

But, what is that law maker?

A department?—no.

The subordinate of a department?—no.

What law has it enacted?—the Constitution.

What laws can it enact?—Constitutions.

It made, and can unmake, the three departments. It gave them power: "The powers hereby granted, shall "be vested."

It controls their power:—"No bill of attainder shall be "passed; nor shall private property be taken for public "use, without just compensation." It can take away their power, and abrogate their acts.

They are subjects, then; and this is the sovereign.

The people are the Government. "The sovereign, "when traced to his source, must be found in the man." (2 Dal., 458.)

The next inaccuracy in the statement, is in the words: *its revenues.* "The Government has concluded it cannot be interfered with in the collection of *its revenues.*"

The precise reason why the remedy is asked, is, that this property does not belong to "*its revenues.*"

The people never gave it.

The sovereign never authorized the legislature or executive to take it.

They have no title, whatever, to it, but the bare legislative fiat.

And the motto, under which it proceeds, reads: What Congress pleases, has the force of law.

This sounds, as if our system, (in the language of Chancellor Kent, 1 Com., 342), "is *disgraced* by such a "slavish political maxim, as that with which the Institutes "of Justinian are introduced?"

"Quod principi placuit, legis habet vigorem."

Inst. 1, 2, 6.

Followed to its necessary result, this statement, if of any force at all, shows that the Government of the United States is a despotic Government. (2 Dallas, 461, 462.)

There is a concentration of the powers of government in a single branch of it, which, whatever be the form of the Constitution, will be a despotism,—a government of unlimited, irresponsible and arbitrary rule.

This usurpation of power, never granted to any department; this attempt to give the force of law to the bare fiat, and to compel co-ordinate departments, silently or actively, to acquiesce in the violation of the Constitution, is not less an usurpation, than the assumption of some power that had been delegated to another department, would have been. The principles which apply to the latter case, control also the former, and they are laid down concisely, and with reasons, easier to out-vote than to answer, in *Du Chastellux* v. *Fairchild*, 15 Pa., 18. p. 20. The opinion of the Court was delivered, July 15, 1850, by Gibson, C. J.

" If any thing is self-evident, in the structure of our " Government, it is that the legislature has no power to " order a new trial, or to direct the Courts to order it, " either before or after judgment. The power to order " new trials is judicial; but the power of the legislature, " *is not judicial. It is limited to the making of laws;* not " to the exposition or execution of them. The functions " of the several parts of the Government, *are thoroughly* " *separated, and distinctly assigned to the principal* " *branches of it: the legislature, the executive, and the ju-* " *diciary, which, within their respective departments, are* " *equal and co-ordinate.* Each derives its authority, me- " diately, or immediately, from the people; and each is " responsible, mediately, or immediately, to the people, for " the exercise of it. When either shall have usurped the " powers of one or both of its fellows, *then, will have been* " *effected a revolution, not in the form of the Government,*

" *but in its action. Then will there be a concentration of*
" *the powers of the Government, in a single branch of it,*
" *which, whatever may be the form of the constitution, will be*
" *a despotism,—a government of unlimited, irresponsible, and*
" *arbitrary rule. It is idle to say that the authority of each*
" *branch is defined and limited in the constitution, if there*
" *be not an* INDEPENDENT POWER, *able and willing to enforce*
" *the limitations. Experience proves that it is thoughtlessly*
" *and habitually violated; and the sacrifice of individnal*
" *right is too remotely connected with the objects and con-*
" *tests of the masses, to attract their attention.*"

From its every position, it is apparent that the " *conserv-*
' *ative power is lodged with the judciary*, which, in the ex-
" ercise of its undoubted right, *is bound to meet every emer-*
" *gency.*"

SECTION LXXIX.

But it is said that "all taxation is tyrannous, taking a "man's property without his consent; and therefore, as "taxation is lawful, all tyrannies under that name, must "receive the acquiescence, and perhaps the assistance of "the courts."

What is taxation?—In a free or just government it is, taking from each person his due and just share of the expenses of the State, which he, by becoming a member of society, tacitly agreed to contribute, in consideration of the advantages which he receives from society.

Rutherforth's Inst., B. 2., C. 3, 5, p. 272.

In the United States, the rule of proportion is fixed according to the rule of Natural law; this rule, being so fixed, if the tribute is not so taken, it is not a tax, but an arbitrary payment exacted without law.

Ibid., 273.

Is the power of taxation unlimited?—No; for, by the Constitution it is circumscribed with rules.

Is it irresponsible?—No; for the fundamental law commands the manner of its exercise; and to that law it must answer.

Is it arbitrary?—No; for it can be exerted, no otherwise than according to the rules of the Constitution.

It has not in it a single element of tyranny.

Its abuse alone is tyrannous.

In the statement, we have been considering, the conclusion drawn from the premises, is not less false than the premises themselves.

It has been the obsequious maxim of those who have made themselves the tools of tyrants, but has no warrant in the spirit of our institutions, or those from whence our own were derived.

The fact that large powers, liable to be abused, were exerted, has furnished a sufficient rule for close scrutiny.—Bracton, Coke, Holt, Denman, and even Lord Mansfield have won respect, approval, and eternal gratitude, by throwing the whole power of the law against the extension of arbitrary power; and Blackstone's apostacy does not change the common law, as we received it.

His Commentaries were written less than twenty years before the revolution. And the manner in which his heresy was denounced, as well as the principles of government and the powers, and duties of the Courts, sanctioned and understood by the framers of the Constitution, were stated by the Supreme Court,—through one who was just fresh from the Convention that framed the Constitution itself,—in the case of *Chisholm* v. *Georgia*, 2 Dallas, 419.

At page 458, the Court, having considered the feudal system, proceeds: "Into England this system was intro-
"duced by the Conqueror; and to this era we may prob-
"ably refer the English maxim, that the King is the Sov-
"ereign, and fountain of Justice. But in case of the King,
"the sovereignty had a double operation: While it
"vested him with jurisdiction over others, it excluded all
"others from jurisdiction over him. With regard to him,
"there was no superior power; and, consequently, on
"feudal principles, no right of jurisdiction."

This reason shows the jurisdiction of the People's Courts over the legislative Acts, and the executive pursuing them; for, there is a power superior to both, and a

superior law, whose enforcement is lodged in the conservative department of Government.

The opinion proceeds: "'The law,' says Sir William "Blackstone (1 Com., 241, 242,) 'ascribes to the King "'the attribute of sovereignty: he is sovereign and inde-"'pendent within his own dominions; and owes no kind "'of subjection to any other potentate upon earth. Hence "'it is, that no suit or action can be brought against the "'King, even in civil matters; because no court can have "'jurisdiction over him; for all jurisdiction implies "'superiority of power.

"This last position is only a branch of a much more ex-"tensive principle, *on which a plan of systematic despotism "has been lately formed in England, and prosecuted with "unwearied assiduity and care.* Of this plan the author "of the Commentaries was, if not the introducer, at least "the great supporter. He has been followed in it by "writers, later and less known; and his doctrines have, "both on the other and this side of the Atlantic, been im-"plicitly and generally received by those, *who neither ex-"amined their principles nor their consequences.*"

This systematic despotism, so formed in England, the Colonies rebelled against; and the result was revolution, and the Constitution, thus expounded.

The Court proceeds (p. 460):

"In England, according to Sir William Blackstone, no "suit can be brought against the King, even in civil mat-"ters. *So, in that Kingdom, is the law at this time recei-"ved.* But it was not always so. Under the Saxon Gov-"ernment a very different doctrine was held to be ortho-"dox. Under that Government—as we are informed by

"the Mirror of Justice, a book, said by Sir Edward Coke,
"to have been written, in part at least, before the Con-
"quest;—under that Government it was ordained, that
"the King's Court should be open to all plaintiffs, by
"which, without delay, they should have remedial writs, as
"well against the King or against the Queen, as against
"any other of the people. (4 C. A. N., 487.)

"The law continued to be the same for some centuries
"after the Conquest. Until the time of Edward I., the
"King might have been sued as a common person. The
"form of the process was even imperative: '*Præcipe Hen-*
"'*rico, Regi Anglico*,' &c.: 'Command Henry King of
"'England.'" &c.,

(Brac., 107; Com., 104.)

"Bracton, who wrote in the time of Henry III, uses
"these very remarkable expressions concerning the King:
"'*in justitia recipienda minimo de regno suo comparetur*';
"in receiving justice, he should be placed on a level with
"the meanest person in the Kingdom.' (Com., 104.)

"True it is that *now*, in England, the King must be
"sued in his Court by *Petition*; but, even now the differ-
"ence is only in the form, not in the thing. The judgments
"or decrees of those Courts will substantially be the same
"upon a *precatory* as upon a *mandatory* process. 'In the
"Courts of Justice,' says the very able author of the con-
"siderations on the laws of forfeiture, 'the King enjoys
"many privileges; yet, not to deter the subject from con-
"tending with him freely.' (G. F., 124.)

"The Judge of the High Court of Admirality in Eng-
"land, made, in a very late cause, the following manly
"and independent declaration: 'In any case, where the
"'Crown is a party, it is to be observed, that the Crown

" 'can no more withhold evidence of documents in his
" 'possession, than a private person. If the Court thinks
" 'proper to *order* the production of any public instrument,
" 'that order *must* be *obeyed*. It wants no *insignia* of an
" 'authority derived from the Crown.'
(Col. Jur., 68.)

" 'Judges ought to know that the poorest peasant is a
" 'man, as well as the King himself: all men ought to
" 'obtain justice, since, in the estimation of justice, all men
" 'are equal, whether the Prince complain of a peasant, or
" 'a peasant complain of the Prince.'
(War. 343.)

" These are the words of *a King*;—of the late Frederick
" of Prussia. In his Courts of Justice, that great man
" stood upon his native greatness; and disdained to mount
" upon the artificial stilts of sovereignty."

Turn where we will, no precedents for tyranny can be found in the utterances of wisdom.

Servile cowardice, indolence, imbecility, selfishness, corruption, and usurpation, have all, always covered these irregular courses with the names: State necessity, State dignity, mighty importance, and the impossibility of considering such small matters as individual rights. But greatness, honor, wisdom, have never so spoken; such things have never by them been done, save in the heat of rebellion, or the throes of war, when the nation's muscles were all strained and its powers taxed to their utmost; —Then, and only then, can they be justified;—State necessity and People's liberty forbid!

In the cases at bar there is not even the *prima facie* right. The assessments which are copied in the Bills show

the nature of the claim. And the sworn Bills demanding answers under oath not only defeat the presumption of regularity, but present evidence which unanswered is conclusive that the imposition is forbidden by the Constitution.

I will not answer the quibbles on the meaning of the word "tax" as found in the statute, the case too broad; the claim is that the end of the Constitution shall be realized, and that CONSTITUTION,—"the Judges are bound on "oath or affirmation to support." (2 Dal. 409.)

SECTION LXXX.

In concluding this branch of the argument, caution perhaps excessive—lest the position should be misunderstood, and the division between *irregularities* and *illegalities* be confounded—prompts me to define the boundary and with it, the line between those cases wherein Chancery will interfere, and those, in which it cannot be called to exercise its powers:

The *illegality* of a tax, must consist in the fact that it violates some controlling law;—its *irregularity* need not consist in the violation of any law.

It may consist in the slightest technical variation from common practice, or from the directory parts of a statute;—or it may be of greater magnitude; and in some cases great doubts, as to the effect of the irregularity, must exist;—or it may be of so gross a character, as to make the whole proceeding clearly illegal.

If a tax is irregular, merely, and the Government has acquired, and retains a present right to the tax, and there is a corresponding obligation on the citizen to pay it—a Court of Equity cannot interfere, but will leave the party to his remedy against the officer, who committed the error, for any damage resulting from his irregular act.

But, if the irregularity consists in the failure to do some act, which the law makes a condition precedent, to the right of the Government to the tax, so that the Government has no right, and the citizen is under no obligation to surrender his property,—it is unlawful to take it without right,—and Chancery will interfere.

Where, as in the cases at bar—an illegality, consisting of a direct violation of the Constitution, is presented,—no doubt or difficulty can exist. In cases of irregularities, however, it will be, as it has been in State taxation,—upon which a very learned Judge once said: A case upon the validity of a tax, is often one of extreme difficulty: The necessities of the State, on the one hand, which have caused it to hold out extraordinary inducements to purchasers to invest their money, and, on the other, the right of the individual to be protected in his property, from the illegal action of the State, present opposing rights and equities, which deserve the most careful consideration. The principles, which govern, must be patiently sought out and clearly ascertained, and then, applied with care. And the very difficulties which surround the subject, furnish the strongest reasons for most careful consideration of the subject, lest, by ill-considered action, gross and irreparable wrong be done by the department, organized to give a remedy for every wrong.

The distinction is, that, where the State has the present right to the tax, Chancery will not interfere to prevent the collection, however irregular the preliminary proceedings may have been; but, where it has not the right, the taking is illegal, and Chancery will prevent an injury, for which there would be no prompt, adequate and complete redress *by suit or action at law.* And, as the State cannot be sued, it will always interfere, to prevent the transfer to the State, of the specific article, which specific article, being so transferred, will be placed beyond the reach of a suit, or action at law.

Osborn v. *U. S. Bank*, 9 Wheat.

Mott v. *Pennsylvania R. R.*, 30 Penn., 9.

Ottawa v. *Walker*, 21 Ill., 605.
Morris, etc., v. *Jersey, etc.*, 1 Beasl., 227.
BURNETT v. CINCINNATI, 3 Ham., (Ohio) 73. (*See especially* pp. 87 and 88.
Culbertson v. *Cincinnati*, 16 Ohio, 574.
VANOVER v. DAVIS, 27 Geo., 354.
Fremont v. *Boling*, 11 Cal., 380.
MILLER v. GROMAN, 38 Penn., 309, p. 311.
MATTHENY v. GOLDEN, 5 Ohio St., 361.

(These authorities apply to the whole of this section and those printed in small capitals seem to support the whole case, most clearly; therefore I ask especial examination of them.)

This mode of application for relief, sanctioned—as we have seen—in the case of the *United States Bank* v. *Osborn* (9 Wheaton), is the logical sequence of this principle of all good governments.

"The prerogative of the Crown" (or Government) "extends not to do any injury; for, being created for the "benefit of the people, it cannot be exerted to their prejudice." (Plowden, 437.)

"A wrong is not chargeable, personally, on the King" (or Government), "nor is he, *but his ministers*, accountable to the people."

3 Bl. Comm. 254.

In doing this wrong, these ministers are without the sanction of the prerogative of Government; and their wrong, under color of that right, should be stayed.

CHAPTER II.

DO THE PLEADINGS PRESENT A CASE FOR THE EXERCISE OF THAT JURISDICTION?

And, if they do, and the Court has the power to issue the injunction and mandamus,—are those the proper remedies?

Introduction.

Much of the first Division of this Argument, necessarily applies to the points presented in the heading of this Division; and much, contained in this Division, must apply directly to support the jurisdiction of the Court. The subjects are so interwoven that they cannot be separated. And I will ask the Court to consider both Divisions in examining the preliminary question of *jurisdiction*.

In examining this division, in relation to the merits of the case, I will ask the Court to recur to the bill in the Appendix to this argument, in which the particular grievances are stated.

As the charge of unconstitutionality is applied, by our complaint, to 54 Sections (about 40 pages) of the Revenue Act, the extent of the application is such, that the usual form of presenting such questions, by citing each provision and presenting all the arguments applicable thereto, would be tedious; therefore, we will endeavor first to ascertain the fundamental principles, by which these sections must be tried.

SECTION LXXXI.

THE OBJECT OF THE CONSTITUTION

was, to form a more perfect union, establish justice, insure domestic tranquility provide for the common defence, promote the general welfare, and secure the blessings of liberty to the people and their posterity.

Chisholm v. *Georgia*, cited Sec. 50, ante.

Rhode Island v. *Massachusetts*, cited p. 134, ante (12 Pet., p. 729.

That this was the intention of the law maker in its enactment, we gather:

1st. From the announcement and solemn declaration of the people of the world.—Either the people solemnly lied, or, those were their objects.

2d. From the mischiefs, and their proper remedy.

History plainly shows that the Union was so imperfect, under the Confederation, that domestic tranquility was in danger, and effective provisions for the common defence and general welfare, could not be made by the general Government, or rather, by the advisory counsel and general Confederacy, whose powers were so limited as to be hardly worthy of the name of Government.

The other mischiefs extended far back into Colonial and British History, and had made revolution and confederation, and finally the formation of this more perfect union, the insuring of domestic tranquility, and provision for the common defence, absolutely necessary to establish justice for the people and secure, to them and their posterity, the blessings of liberty.

3. The preamble and enacting clause are in these words.

4. Contemporaneous construction, in the general Declaration of Independence, in 1776; in the resolutions and actions of the Colonies and original States, and in the writings and utterances of sages of those times,—all testify that *the establishment of justice and the security of liberty* was the great object of the people.

To ascertain the meaning of this fundamental law, the whole must be construed together, and all with reference to this intent and object; and if the words used, fairly convey a meaning which will promote that object, that meaning must be adopted; and any interpretation, inconsistent with the object, must be rejected.

THE SPIRIT OF THE ACT IS:

Justice and liberty. Justice to, and justice from, the citizen; liberty protected by law, and law enforced in justice.

This spirit being understood, the Courts are so to construe the words used, as to suppress the mischief and advance the remedy (Dwarris 614). And so far will this rule apply that other cases, within the mischief and occasion, though not expressly within the words, will be included within the purview (Dwarris, 615 and 616). Again: being *pro bono publico*, it shall be construed in such a manner that it may, as far as possible, attain the end proposed (id. 618).

This Court has already so construed the Act, in assuming jurisdiction in the Yerger Case; scouting with authority the idea, that it had any other object or spirit, than pure justice and liberty (8 Wallace, 85).

And, on the other hand, as applicable to the Acts of Congress, the rules of Common Law agree with this spirit. Acts which abridge the liberty of the subject ought to be strictly construed (Dwarris 646); and those, which impose taxes and burdens, must be clearly and unequivocally expressed (ibid.). Powers, derogatory to private property, must be construed strictly and not enlarged by intendment (id 648); and it may be laid down, as an invariable rule, that *the law favors liberty* (id 675).

SECTION LXXXII.

To attain these Objects.

The people vested in Congress all legislative powers which they granted (Art. 1, S. 1,) and no others; (Note to Hayburn's Case, 2 Dallas, 221).

They vested the executive power in a President (Art. 2, S. 1), who shall take care that the laws be faithfully executed, and shall commission *all* the officers of the United States (Art. 2, S. 3).

They defined these laws—this Constitution, and the laws of the United States, which shall be made in pursuance thereof, * * shall be the supreme law of the land, and this supreme law shall be faithfully enforced, even under the most trying circumstances of State opposition. (Art. 6, 3.)

They vested *the judicial power of the United States* in one supreme Court, *and* such inferior Courts as Congress may from time to time ordain and establish. (Art. 3, S. 1.)

They extended the judicial power to *all* cases in law and equity, arising *under the Constitution* and the laws of the United States. (Art. 3, S. 2, 1).

They provided that the trial of all crimes, except in cases of impeachment, shall be by jury, and that such trial shall be held in the State where the crimes shall have been committed. (Art. 3. S. 2, 3).

They empowered Congress to lay and collect taxes, duties, imposts and excises, and to make all laws necessary and proper to carry this power into execution, provid-

ing that all direct taxes should be proportioned to the census. (Art. 1, 3; Art. 1, S. 9, 4), and all duties, imposts and excises shall be uniform, throughout the United States. (Art. 1, S. 8. 1); and that no tax, or duty, shall be laid on articles exported from any State. (Art. 1, S. 9, 5).

All these provisions, and many more, were made to attain the objects, named by the people, if we can take their word; and as the Dred Scott case (19 How. 393) has settled the point that, at the time the Constitution was enacted, the people believed that the Blacks had no rights which white men were bound to respect, and (as a consequence) that no injustice could be done to them. Even Art. 1, S. 9, 1 (forbidding Congress to prohibit their importation within 20 years) indicates that the establishment of justice and the preservation of liberty to men who had rights, required that the Citizen's right to acquire, possess and enjoy property, should be subject to no regulation or control, except that of the respective States, until the instruments of acquisition and trade in this questionable property, which had been acquired under legal sanction, should die out under the withering spirit of this law of liberty.

SECTION LXXXIII.

Construction.

As these were the objects for which the Constitution was ordained, namely: *to establish justice and secure liberty*, every provision of the Constitution must be construed in harmony with this end, unless such construction is forbidden by the plain, clear and exclusive meaning of the words used.

Under this rule must be construed the delegation of power to Congress, to make all laws, necessary and proper to carry into effect the powers vested in it.

Before going farther, let us observe this phraseology: As, of the Magna Charta, not one word should be suffered to escape (2 Co. Inst., 57), so of this Constitution: couched in simplest words, most aptly chosen, each one speaks a volume.

"Congress may make all laws necessary,"—Had it stopped here, it might have seemed as if Congress, in this, was omnipotent, like Parliament: Sovereign and Judge; but, even here, its power is checked, and the word 'proper' added. How shall we construe this word? Any means, necessary to an end, an also the proper means for its accomplishment. If this is the correct construction, the sentence involves tautology, and tautology is an exception in this instrument; it also involves a quibble, and the Constitution of a mighty nation is not so mean, as to descend to quibbles, or be construed thereby.

An illustration developes the correct meaning:

A counsel has a right to be heard, and to move the Court; and he may do all things, necessary and proper to

that end;—he enters the Court,—another is speaking,—it is necessary that he interrupt him, to be heard; but, it is not proper;—therefore, he cannot be heard.

So, of this clause: Congress may accomplish its object by all laws necessary, provided they are proper; if improper laws are necessary to succeed, it must fail.

The rule of propriety is found in the spirit of the Act, and the object of its enactment.

The people did not intend to form an instrument, which should defeat the objects for which they created it; and would esteem every Act of Congress, their Agent, which should be at variance with the objects, to accomplish which it was constituted,—as improper.

And no statute, which violates any man's liberty, or renders its blessings insecure, or that can work injustice,—can be passed, to carry any of the powers granted, into effect.

None of the powers were granted for such purposes. (Plowden, 437.)

The Constitution of the United States is a law for rulers and people * * * and covers with the shield of its protection all classes of men at all times and under all circumstances.

Exparte Milligan, 4 Wallace, 120.

To this we have appealed, and from the only power which can enforce it, have asked our remedy.

SECTION LXXXIV.

Amendment 4.

"The right of the people to be secure in their persons, "houses, papers and effects, against unreasonable searches "and seizures, shall not be violated; and no warrants shall "issue, but upon probable cause, supported by oath or af- "firmation, and particularly describing the place to be "searched, and the persons or things to be seized."

This, also, was enacted, "to establish justice," and secure to all, who had, or should have rights, the "blessings of liberty."

It is to be observed that this limitation is not confined to any department, to which power has been delegated.

No warrant, whatever,—either from the legislative department, acting either as the grand inquest or legislature of the nation,—nor from the executive department,—nor from the judicial;—"*No* warrant," covers all; and, as there is no ambiguity in the words, their plain meaning should govern their construction, except as limited by the context.

And this context refers to unreasonable searches and seizures; therefore it would appear that the ordinary writs of Courts of Justice in civil cases, which issue only to compel justice, in a manner ascertained by judicial examination, to be reasonable, and which never authorized search, —were not forbidden;—

Nor were writs of extent—in this country called distress warrants, or, executive warrants—for the taking of the

property of the Government from its debtor, or of the share of the State from the property of the citizen. These issued on no questionable right, never authorized search, and only obtain when (as in Lord COKE's definition of a tax) the State hath a part, or share, in any man's goods or estate, and the State will take its share, or compel the citizen to separate it.

This is the decision in *Murray's Lessee* v. *Hoboken Land &c., Company*, 18 How., 272, in which a writ of extent, or distress warrant, against a defaulting Custom House officer, is held to be without the purview of this Article, because: striking a balance of the accounts, rendered by the officer to the Government, was not a judicial Act (p. 281); and the proceeding was one for the recovery of a debt, of which a search warrant was not made a part (p. 285). And the Court concludes: "In substance, it is an "extent, authorizing a levy for the satisfaction of a debt; "and as no other authority is conferred to make searches "and seizures, than is ordinarily embraced in every exe- "cution, issued upon a recognizance or a stipulation in the "admirality, we are of opinion, it was not invalid for this "cause." (p. 285.)

The inference from this language is, that, if the writ authorized search, it would be within the purview of this Article of the Constitution. And the whole case clearly shows, that the right to take, must be clear; a debt must appear by the Government records, or the powers, supported in this case, will not compass the matter.—If any doubt exists, and any question is to be decided, the decision of which is to authorize search or seizure, it is a judicial matter, cognizable by the Courts alone, and in the manner designated in this Article (p. 275).

I cannot find that general warrants were countenanced by Courts of justice; or that any warrant, which issued, as a judicial power, at common law, at the date of the Constitution, has been held to be forbidden by this article.

But general warrants, commanding the search of all suspected places, and the seizure of suspected persons, —had been issued by Parliament, or its executive officers; and, instead of falling into disuse, and being disrobed of their authority as precedents,—by the common consent of mankind, like the instances which we shall adduce hereafter,—had been supported by the Courts.

And it is evident that the people intended to lop this power from the legislature, as well as to avoid any authority it might attempt to bestow either on the executive or judiciary, to issue such warrants, or any warrants for search or seizure, not supported by oath, or affirmation, and containing the particular description named.

Warrants of commitment for contempt, by Parliament, had been used as instruments of the most unblushing tyranny, and sanctioned as warranted by the Constitution of England, though framed in deceit, and executed in a manner destructive to justice, (Lord Shaftsbury's case, 6 Howell, St. Tr., 1269; Dwarris, 120 and 121.) Dwarris, denominates it as "so frightful a power" (p. 122), and the judges, in each of the cases cited by him, proceeded with reluctance to acknowledge its existence in the English Constitution, because it was incompatible with the right of security.

Dwarris proceeds: "General warrants they" (the houses of Parliament) "will not permit to the crown, even in "cases of high treason and rebellion." (P. 122.)

From this it appears that the general warrants of England were not regal; we have seen that they were not jndicial; therefore, they must have been Acts of Parliament, or of either house, directing the searches or seizures generally to be made; or they were executive warrants, issued to carry into effect such acts.

Writs of assistance were general warrants; and so were warrants to take up loose, idle and disorderly people. (*Money* v. *Leach*, 3 Burr, 1743.)

And there may have been other methods of search and seizure, in use at the declaration of independence; but we are not safe, in confining the operation of the law to any or all of these.

The object is: to establish justice to secure the blessings of liberty to the people.

The special provision is, that the right of the people, to be secure, in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. To attain this end it is specified that no warrants shall issue but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*

This provision has been held to apply to all magistrates and judicial officers, acting under the authority of the Constitution, placing a limitation to discretion beyond which the judge, however wise or exalted, cannot pass.

Universal supposition, or reputation, general and ill-defined though deep suspicions, cannot justify the search or seizure without the warrant; and no warrant shall issue thereon. Suspicion must be clearly defined by *probable*

cause inducing it, and must designate the place, the persons and the things, with particularity.

Upon even such suspicions, the officer or citizen may not act, except in case of high crimes and extreme urgency, where there is special danger that the criminal may escape,—but must make oath before the judicial officer, who shall decide whether the matters sworn, constitute *probable cause.*

The spirit and meaning of the statute, in using the words "unreasonable searches and seizures," is made evident in this illustration, universally conceded to be within its purview.

There must be suspicion, based upon probable cause, and particularly designating the place to be searched, and persons or things to be seized; and this must be shown by oath to a judicial officer, who, adjudging the cause sufficient, may issue the warrants,—anything less than this, is without the course of law, and violates the right of the people to security.

It appears, also, that the right of security extends, not only to the person and house, but also to papers and effects,—that is, to everything that a man hath. (Co. Inst.)

Now, a thing which is within the object, spirit and meaning of the statute, is as much within the statute as if it were within the letter.

Dwarris on Statutes, 557.

Zouch and Stowell, Plow., 366.

10 Co. Rep., 101.

Any search and seizure, whether by the executive department, or by special messengers of the legislative department, is as clearly unreasonable, when hasty, ill-considered or groundless; and is as certainly within the

object, spirit and meaning, as searches and seizures under judicial authority,—and, under this rule, they would be within the statute, though the letter did not contain them. But we have seen that the letter is general: "The right "shall not be violated, and *no warrant shall issue.*" The words are broad enough to cover the object, meaning and spirit, and the spirit is as extensive as the broadest construction of the words.

It would be absurd to justify such exercise of executive or legislative power, in "a squabble with a bookseller or "an attorney" (see Dwarris, 122), as would be forbidden to the judges in cases equally trifling, because, endangering liberty. And it cannot be contended that the right of security to person and estate is protected from violation, by provisions, which require the most circumspect action, probable cause, and oath of witnesses, particularly identifying the place to be searched, and person or thing to be seized, in cases of conspiracy, treason, murder, robbery and arson,—if the same provisions are not extended to all other cases where the citizen may be required to yield his person or estate to seizure or search.

A superficial examination of a decision of this Court: *Murray's Lessees* v. *Hoboken Land, &c., Co.*, 18 How., 272, has led many to an extravagant idea of the tremendous powers of Government in dealing with tax payers and collectors; but, on closer examination we find, that the case is decided on the ground; that, from Magna Charta to this Constitution, there existed a diversity in the law of the land, between public defaulters and ordinary debtors, which was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the Constitution of the United

States. Not only was the process of distress in nearly, or quite, universal use, for the collection of taxes, but, what was generally termed a Warrant of Distress, running against the body, goods, and chattels, of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it, (p. 278).

The power to collect and disburse, revenue, and to make all laws, necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, *unless* such means should be forbidden in some other part of the Constitution.

The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money, and use it in payment of debts of the Government, and, whoever may have possession of the public money, until it is actually disbursed,—the power to use those known and appropriate means to secure its due application, continues (p. 281).

Thus, this case goes most carefully to its conclusion, acknowledging no vagrant power, and only taking the case of public defaulters out of the operation of amendments 4 & 5, because of the diversity, in the law of the land, between defaulters to Government, and other debtors.

The rule, as to others, is admitted to be different; and whatever the Court may have interpolated, as to them, are merely the chance expressions of learned men; the only law adjudged is, as to defaulting receivers of public revenue, and necessary and proper proceedings as to them.

Some, however, have said that, if so tremendous a power was permitted, any other, equally tremendous, might be used against the citizen. The statement is its own refutation:—and the case before us, carefully read, shows, that the power is the exception;—that it was a singular relic of the Regal tyranies of the eleventh century, and is acknowledged as excepted out of the Constitution, because, noted *an hundred times* as an exception to the operation of general principles. And thus, this case furnishes us an authority, by implication, that any power which seems to contravene the general principles of our Government, must have its sanction in absolute necessity and a clear line of precedents and distinct authority. (A precedent for this reasoning is found in *Entick* v. *Carrington*, 2 Wilson, p. 290.)

As an instance of the rule applicable to all citizens, see Exparte, Burford, 3 Cranch, p. 453.

The warrant of commitment by the Circuit Court was illegal, "for want of stating some good cause, certain, sup-"ported by oath."

Wakely v. *Hart*, 6 Binney, 316, upon an article of the Pennsylvania Constitution similar to this, holds that a private person may arrest, for felony, without warrant; but the case is an authority against this revenue law:—On page 318, the Court, having quoted the Constitutional provision, proceeds: "The provisions of this section, so far as "they concern warrants, only guard against their abuse by "issuing them without good cause, or in so general and "vague a form, as may put it in the power of the officers "who execute them, to harrass innocent persons, under "pretence of suspicion; for, if general warrants are "allowed, it must be left to the discretion of the officer

" on what persons or things they are to be executed. But " it is nowhere said, that there shall be no arrest without " warrant, ; to have said so, would have endangered the " safety of society. The felon, who is seen to commit " a murder, or robbery, must be arrested on the spot, or " suffered to escape. So, although not seen, if known to " have committed a felony, and pursued, with or without " a warrant he may be arrested by any person ; and even " when there is only probable cause of suspicion, a private " person may, without warrant, at his peril, make an arrest. " I say at his peril ; for, nothing short of proving the felony " will justify the arrest. These are principles of the Com- " mon Law, essential to the welfare of society, and not " intended to be impaired by the Constitution. The whole " section, indeed, was nothing more than an affirmance of " the Common Law; for general warrants have been " decided to be illegal; but as the practice of issuing " them had been ancient, and the abuses great, and the " decisions against them, only of modern date the agita- " tion, occasioned by the discussion of this important " question, had scarcely subsided, and it was thought pru- " dent to enter a solemn veto against this powerful engine " of despotism."

See also, 4 Bl. Com., 291 & 2.

1 Opinions, 230. William Wirt, Attorney General, gives his opinion that, if the President order an arrest, by proclamation or instructions to Marshals, such proclamation or instruction, would be in effect, a warrant to arrest, and either of them (if not supported by oath) would be a violation of this amendment to the constitution.

2 Opinions, 266, goes also on the ground that the right of American citizens to be secure from unreasonable arrest, is declared by the Constitution.

The case of *Ex parte Milligan*, 4 Wallace, 2, applies more especially to the succeeding amendments, but in its general principles, covers and effectuates this also.

Story on the Constitution, Sec. 1895, says, this provision seems indispensible to the full enjoyment of the rights of personal security, personal liberty and private property,—and proceeds with instances of the violation of the right, which had recently arisen, and perhaps caused its enactment.

By the licensing Statute, 13 and 14 Car., 2 Cap., 33 Sec. 15, license is given to a messenger, under warrant of the Secretary of State, to search for books unlicensed, and, if they find any against the religion of the church of England, to bring them before the Secretary of State.

(2 Wilson, 289, in *Entick* v. *Carrington.*)

And upon this the Court (p. 292) proceeds: We are inclined to think the present warrant took its first rise from the licensing Act, and we are all of opinion that it cannot be justified by law, notwithstanding the resolution of the judges in the time of Cha. 2, and Jac. 2, that such warrants were lawful.

"It is said,—it is better for the Government and the pub-
"lic to seize the libel before it is published. If the legislature
"be of that opinion, they will make it lawful." * * *
"The law never forces evidence from a party in whose
"power it is; when an adversary has got your deeds
"there is no lawful way of getting them again but by an action." (2 Strange, 1210).

"Our law is wise and merciful, and supposes every man,
"accused, to be innocent, before he is tried by his peers;

" upon the whole we are all of opinion that this Warrant " is wholly illegal and void.

(*Entick* v. *Carrington*, 2 Wils, 275, 11 St. Tr., 313, &c.)

This case shows the Constitution of Britain. It is true, it says; if the legislature be of opinion that it is better for the Government and the public to seize the libel before it is published, they will make it lawful;—but we must remember that the legislature referred to, is Parliament, the tribunal of which Dwarris, p. 87, says: "All " mischiefs and remedies, not within the ordinary course " of the laws, are cognizable by this extraordinary tribu- " nal. It can regulate or new-model the succession to the " Crown. It can alter the established religion of the land. " It can change and create afresh the Constitution of the " Kingdom and of Parliaments themselves;—and its pow- " er is absolute, and without control."

And it is apparent that the Judges felt that, if the power should be put into the hands of officers who execute warrants, to decide on what person or things they are to be executed, and to harass innocent persons, under pretence of suspicion, it would reverse that fundamental law of British liberty, which, being wise and merciful, supposes every man, accused, to be innocent, before he is tried by his peers, and would change and create afresh the Constitution of the Kingdom.

This fundamental law had been, in many cases, suspended by particular Acts of Parliament; but these were exceptions, and without such specific sanction, such warrants were forbidden.

Money v. *Leach*, 3 Burrows, 1743.

A practice had arisen in the office of the Secretary of State, to issue general warrants against the printers and

publishers of obscene or seditious sheets, after the restoration, and continued from 1694 down to 1765. (Story's Const., S. 1865). This case was upon such a warrant, and defended by the Solicitor General; and Lord Mansfield says, p. 1756: "There are many cases where particular "Acts of Parliament have give authority to apprehend "under general Warrants, as in the case of writs of as- "sistance, or warrants to take up loose, idle, and disorder- "ly people. But here it is not contended that the Com- "mon Law gave the officer authority to apprehend, nor "that there is any Act of Parliament that warrants this "case.

"Therefore it" (the general Warrant) "must stand *upon* "*principles of Common Law.*—It is not fit that the re- "ceiving and judging of the information, should be left "to the discretion of the *Officer*; the *Magistrate* ought to "judge, and should *give certain directions* to the officer. "This is so, upon reason and convenience. Then, as to "*authorities*, Hale and all others hold such uncertain War- "rants void, and there is no case or book to the contrary."

"No degree of antiquity can give sanction to a usage, bad in itself."

SECTION LXXXV.

Constitutional Amendment. V.

"No person" * * * "shall be compelled in any "criminal case to be a witness against himself, nor be "deprived of life, liberty or property without due process "of law; nor shall private property be taken for public "use, without just compensation."

This was to *establish* justice and *secure* liberty. Whether the inquisitorial requirements of the internal revenue act, are forbidden by the provision that, no person shall be compelled, in a criminal case, to be a witness against himself, or intrench upon the unennumerated rights which are not disparaged by the Constitution, (Amendment 9), and of which, as parcel of our liberty, we cannot be deprived without due process of law,—this seems the proper place to discuss the matter itself. Nice distinctions, as to which clause protects, are waived; and we are content if the mantle of the whole Constitution covers us.

(1). It was provided by the Statute of Marlbridge (Cap. 1), that all persons, as well of high as of low estate, shall receive justice in the King's Court. On which Lord Coke remarks (2 Co. Inst., 103): "These words are of "great importance; for all causes ought to be heard, or-"dered and determined before the Judges of the King's "Court, openly."

Cap. 22, of the same Statute, reads: "None, from "henceforth, may distrain his freeholders to answer "for their freeholds, nor for anything touching their

"freeholds, without the King's writ, nor shall cause "his freeholders to swear against their wills, for no man "may do that without the King's commandment." And upon this Coke says (2 Inst., 142): "Before this Statute, "Lords would distrain their free tenants, to come and "shew their deeds, specially the original deed, whereby "they might know by what rent and services the tenancy "was holden, of them; and obliquely many times peru-"ing the deeds (which are the secrets and sinews of a "man's land), brought in question the title of the free-"hold itself."

This statute forms still a part of the British Constitution. It emanated from the King, when the King was the fountain and source of all power; and the rights of the people which arose from it, formed part and parcel of the liberty of British freemen.

The fountain and source of all power was, through his judicial power to grant justice to all, as well of high as of low estate. As his successor, the People of the United States have ratified his promise, and "provided, agreed "and granted, that all persons, as well of high as of low "estate, shall receive justice," through the judicial power of the United States,—as well the magnate as the slave.

Either this is true, or one right of British freemen, established in 1267 and brought by the Colonists to America, was denied or disparaged by the Constitution.

Next: All held their lands and power, mediately or immediately, from the King. All the power of the Lords was granted by the King, and derived from this source. High estates, for the purposes of Government, and revenues for their support, were of his creation. The parallel continues. In America, the supreme power still remains in

its source. High estates have been created, executive and legislative.

The obligation to pay taxes, and satisfy all just dues to the high estates, now has the place of rents and services of tenancy. And the mischief is in part the same, and in part parallel.

Then, the deeds were required for a just purpose; that the lord might know what rents and services were due him, and might collect them. The deeds were the secrets and sinews of a man's land.

Now, the report of all the doings of a man are required, that the authorities may know what taxes are due, and may collect them. These matters are the secrets and sinews of a man's trade and livelihood, which, as we shall see hereafter, ranked with his land in importance and protection.

Then, the concealment of the deed might often conceal the dues of the Lord, and defraud him of the revenue which was his right; but, compulsion to cause a showing of the amount due, in this most direct manner, was forbidden, because the lord, many times, obliquely perusing the deeds, "brought in question the title of the freehold itself."

Now, concealment of these doings, secrets and sinews of a trade, may enable a man to defraud the authorities of their revenue; yet, those authorities may not distrain him to exhibit them; because, obliquely perusing them, the authorities, many times, bring in question the trade itself,—obtain its art and mystery, without compensation (Attest the army of distillers who have gone from Revenue Offices into that trade), obtain the evidence, which shall show the title forfeited, and the person, whose secrets are thus exposed, to be liable to fines and imprisonments.

The objects of oblique inspection being far greater now than then, the reason and mischiefs, for which the rule was made, extend it to this case.

The King's Writ, issued only from him, as fountain and source of power, or through his judicial power; therefore, the writ, upon which these questions can be examined, or men compelled to swear against their will, must come from the people, by express warrant to their creatures, or through the people's judicial power.

The Constitution of the United States is a law for rulers and people * * and covers with the shield of its protection, all classes of men, at all times, and under all circumstances.

Ex parte Milligan, 4 Wallace, 120.

Having, in the last Section, shown the antiquity of the rule, and its parallel in principles with the case before us, we now proceed to the more modern application of these principles by the Courts:

That a man cannot, upon indictment or information against him, be compelled to testify against himself, is a proposition that needs no argument.

That in England, and in this country, all are privileged to refuse to answer any question, the answer to which might criminate, or tend to criminate them, by virtue, and as part of their Common Law liberty, derived from the British Constitution, will not be questioned.

That no person can be compelled to furnish evidence of crime against himself. (Rex v. Cornelius, 2 Strange, 1210. Entick v. Carrington, 2 Wils. 275, p. 292, and cases cited), is well established. Rex v. Cornelius, was a case, where defendant had been indicted; Entick v. Carrington

was, where no charge had been made, but the officers desired to proceed, to examine for evidence—and the rule has never been changed or modified.

And the question now is, whether it is consistent with constitutional liberty,—protected by these rules,—to permit a person to be compelled to keep books, and make reports, and furnish statistics, to be used against him as evidence for his indictment and conviction on criminal prosecutions, and prosecutions for the forfeiture of his freehold and property, for violation of law.

The question, thus stated, answers itself in the negative.

But it is claimed that these inquisitorial requirements are, primarily, to enable the assessors correctly to assess the tax, and are only secondarily used as evidence against the person required to make and keep them.

This evades the question, and does not answer it. In every criminal trial, these books and reports are used: Detectives and Supervisors scan them, and find in them evidence from which to work up their charges, and use them, in support of the charges they make, to obtain informations and indictments and convictions thereon.

Now; has the man testified against himself or not? Has he furnished evidence against himself to the informer and the Court, or not? If yes,—has he done it by compulsion, or freely?

A man is not compelled to answer questions, the answer to which may criminate him, not because he is then a witness against himself, but because what he testifies may impair his security, and furnish evidence to be used by an informer:—does he do any more, then, than in this case?—We think not.

But, they say, if he commits no crime, he furnishes no evidence against himself; if he voluntarily commits the crime, he voluntarily registers it. And this argument is sometimes soberly urged.

The answer is two fold:

(1.) A man may refuse to answer a question, which may tend to criminate him, not because he is guilty, but because, in the eye of the law, he is innocent, and cannot be questioned on the subject, at all.

(2.) All crimes are committed voluntarily. In every city are numbers of men, women and children, who are known to live by crime, and who commit most of the depredations upon society. Can government place such persons, merely because they are suspected, under the surveillance of officers, and allow all officers free access, at all times, and to compel them to keep a register, and report every act, and allow the officers full liberty, at all times, to examine these registers?

If they commit no crime, they would furnish no evidence against themselves;—if they voluntarily commit the crime, they must voluntarily register it.

This is is a parallel case. Extend it through society, and you have out-Heroded the espionage of the French police, and Diocletian's systematic scrutiny upon the most secret whispers of his people.

The right of trial by jury, and its incidents, is deferred to a subsequent section.

The subject of excessive fines, and cruel and unusual punishments, needs no comment, before we come to its direct application to facts before us.

SECTION LXXXVI.

Constitutional Amendment, X.

"The powers not delegated to the United States, by "the Constitution, nor prohibited by it to the States, "are reserved to the States, respectively, or to the people."

We have seen that all powers, necessary,—to form a perfect Union,—to establish justice in all cases, and states where, but for the Constitution, it would be insecure,—to insure domestic tranquility, to provide for the common defence, and promote the general welfare, and to secure the blessings of liberty to its framers and their posterity,—were delegated by the People, in Constitution, to the United States.—We now find that the people reserved to themselves the power to control this enactment, and to repeal, alter, amend, or new-create, a People's Constitution.

This power was not reserved to the States, because the States had never had it. The States had formed a confederation as Sovereign States; but such Union could not be perfect enough to accomplish the ends desired. Therefore, the People, as People—not as States—had acted; and now declare that they reserve to themselves the right to act again. The States, however, though shorn by the people of the attributes of nationality, exercised vast powers of internal regulation, within their respective jurisdictions, extending to all matters

cognizable by a republican government, not granted expressly or by implication, to the Government of the Nation; and—these powers were reserved to the States.—Yet, the People reserved to themselves, as people of the several States, the right to unmake, and make again, their State Governments, subject only to the condition, that they must be republican in form, and, as People of the Nation, in utter disregard of the State Governments, to repeal, amend, or re-create the fundamental enactments of Nationality. This further appears, by the enactment that, this Constitution shall be the Supreme Law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding. "Shall be"—not "is"—the supreme law of the land. If any power was reserved to the States, as States, or to the people of the several States, as people of such States, to abate, repeal, alter or amend any provision of the Constitution, either in the fundamental law of such State, or in its legislative enactments,—then this provision was annulled, and made to read: this Constitution shall not be the supreme law of the land, if anything in the Constitution or laws of any State, shall withstand its operation.

If this power is reserved, thus exclusively, *to* the People of the Nation, as such, much more is it reserved *from* its Creation, which has no power at all, except by the delegation of this people: and no department can exercise any power, not delegated, expressly or by implication, to carry into effect the powers granted.

SECTION LXXXVII.

The 13th Amendment enacts that, "neither slavery, nor "involuntary servitude, except as a punishment for crime, "whereof the party shall have been duly convicted, shall "exist within the United States, or any place subject to their jurisdiction."

Involuntary servitude is one of our complaints.—It is said that if the plaintiff remain idle, he is subject to no servitude; if he voluntarily prays a license, and commences work, he suffers no involuntary servitude.

The fallacy is in assuming, that he prays his license, and commences voluntarily.—The bill shows that he had the property when the statute was enacted, that he must pay $5,000 a year for it, and must commence work or lose the money; that, to commence, he must pray a license, and work under it; and, instead of being a voluntary act,—his praying for license, and working under it, is compelled by a $15,000 penalty.

If he had not had the lease till to-day, the fallacy would still remain; for, he has the right to acquire property, and, when acquired, to use it,—precisely as the former owner would have one; for, it is the same property, and possesses the same attributes. He is not Tantalus, and the Government an avenging God,—to surround him, thirsting, with water, yet when he stoops to drink, to dry it away before he can reach it; or, to present food to him, starving, only to snatch it away, when he reaches for it, or turn it into stone, if he touches it.

What!—if a man has a right to acquire property and

enjoy liberty,—can he be compelled to surrender liberty to acquire property? If he must surrender one right, in order to keep the other, he has not the right to both.

By natural law, rights are qualities, which are inherent in the Person,—and are divided into two sorts: perfect and imperfect.

Among absolute rights are numbered: the right to acquire and enjoy property, and the right of personal security.

Rutherforth's Inst., 14 et seq.

Grotius, Lib. 1, Cap. 1, S. 4 et seq.

I will not waste the time in metaphysical discussion, and will go back to authorities of law. Puffendorff and Grotius, very early discovered these points as matters of Philosophy; Blackstone, Kent, and a legion of decisions, are witnesses to them as facts.

SECTION LXXXVIII.

The object being, in all these cases, to establish justice and secure liberty,—if we define justice and liberty, we have the key to the construction which must be given to the whole.

In attaining this definition, we will examine the res gestæ, and the foundation of this Constitution:

The Law of Nature.

We are taught that, in a state of Nature, men were absolutely free, and rights of property did not exist; that acquisition and use of material things, inaugurated the notions of property; and violence made it necessary to form societies, for the protection of the person, and security in the enjoyment of material things; that, in entering into a state of society, men surrendered a part of their liberty and property, in order to secure the remainder; and that justice is established, and the blessings of liberty are secured to the members of society, when only such portions of his liberty and property are taken from him, as he agreed to surrender;—and the remainder is secured to him.

Under this natural law,—

(1st.) Stolen property may be seized from a thief, and restored to its owner, before conviction; it is not the prop-

erty of the accused; *his* property may not be taken from him, till conviction, and then, only to the extent fixed by the judgment.

(2d.) Any fine, or punishment, which exceeds due proportion to the offence, is excessive and contrary to this law.

(3d.) Forfeitures for crime, in addition to the fines imposed, are unusual and excessive.

(4th.) When they extend to the wagons, freehold, or means of livelihood, they are contrary to the rights reserved.

It is not to be supposed that when people came together for protection, in society, and bound themselves and their posterity, that they designed to place themselves in such a position, that all they had could be taken away, and the very object for which they came together, be defeated.

Nor is it reasonable to suppose that they intended so to place either themselves or their children, that, if they committed a fault of lesser magnitude, so that society would not require the life or perpetual punishment, but would permit the culprit to return to his position in their ranks,—

It may not be supposed that they intended to be forced to ruin, by loss of freehold, of implements of labor, or the use of the skill whereby, alone, they could live;—these things would compel them to other, and greater crimes, till society must drive them forth, altogether.

If the consequences of a slighter crime are as great as for the highest,—what is there to check one, disposed to do evil, from commencing at the most atrocious of the catalogue?

A father, joining this social compact, for himself and his

posterity,—knowing that man was prone to evil, as the sparks to fly upwards, certainly did not intend to expose his son to absolute destruction for the first freak of mischief,—but rather intended to place him under the tutelage and tender care of the State, which, by wise chastisements for wrong, and constant encouragement to do right, steadily pursues the course, which would check the natural aspirations after evil, and develope aspirations after goodness and wisdom,—thus doing the greatest good to the greatest number. If this was the compact, then every man has the right to its benefits; and none may, in homely phrase, be compelled to reason that, "it is as well to die "for a sheep as a lamb;"—and punishments should be meted out in proportion to the offence.

Further, if the offender can return,—as he has been chastened for his profit, he should have the result of former labor, his freehold and his livelihood, left to him, so that he may therewith bring forth fruits meet for repentance, and, keeping his countenance, not be compelled to slink away to the dark recesses of want and crime.

An there is reason in the old writers, who speak of the countenance, which a man hath by reason of his freehold.

If a man who has been accustomed to be poor, has attained a little money, but no freehold, and loses the money,—he lives as before, and feels no disgrace; he is not destroyed;—reduce a man, who has been accustomed to live in elegance, to the same condition, and he feels that he has nothing to live for. The poor man knows the wickedness and crime which surrounds him, and knows also the good; the other sees only squalor, wretchedness and crime: loathing and despair fill him; at first he shrinks from the evil; then—embracing—fast runs the downward road.

Thus we find, that the worst criminals and basest denizens of the abodes of vice, are those who have seen better days.

And now, add to the misfortune of reduction, in all his surroundings the brand of criminal or felon, as the cause of his misfortune, and—what hope is there that he can ever rise! The air he breathes, the food he eats, the place he sleeps, and the men who are about him; yes every privation that he suffers,—burns his disgrace deeper into his heart; he feels the curse of Cain is on him, and that every man is his enemy.

A punishment, then, which shall reduce each man to the same dead level in surroundings and property, is not an equal punishment; and a man, as *man*, has a right to be saved from such torments and destruction.

Society, too, owes a duty to itself, and may not encourage, or tempt mankind to crime.

In closing this reference to the natural law of punishments:—the declaration of the people of a great State, as well as of the sages of the law thereon, speak, with greater weight than an obscure counsel can hope to do: "The "true design of all punishment is to reform, not to exter- "minate mankind."

Const. of Ills. Art. XIII., Sec. 14.

Rutherforth's Inst. B. 1, ch. 18, S. 3 and 4.

Grotius. Lib. 2, ch. 20, S. 6.

(This natural law commends itself to our reason. Grotius, Puffendorf, Rutherforth, &c., are accepted or rejected, as the developments of experience have supported their theories, or shown them impracticable.

I have not thought it necessary to refer particularly to these, in illustration or corroboration of the foregoing; the

treatment they have given of the subject, has scattered the quotations through many chapters; and, as the Court would examine their text, by its reason, I have condensed it for the same purpose.)

The natural law agrees also with Divine law; for, though "men corrected their children after their own pleasure," HE "chasteneth for our profit;" and, "it yielded the peace-"able fruits of righteousness unto them, which are exer-"cised thereby."

Hebrews XII., 9, 10, 11.

SECTION LXXXIX.

The Spirit of the Times

When the Colonies of America cast off their allegiance to British rule, and assumed a place among the nations of the earth, their people had, with deep philosophy and wonderful practical sagacity, arrived at very clear perceptions of the objects of government, and the rights and obligations of the governed.

The experience of Britain was before them; and all the rights and liberties of British freeman, under the British Constitution, were claimed, as of right, theirs,—but, there were other things, wherein even the British Constitution was deficient, that they would correct:

The Legislature of Britain was omnipotent, and held to contain all the wisdom and power of the realm.

The maxim, that the King can do no wrong, had existed beyond the records of history; and the Parliament had been held to be the perfect bulwark of their liberties, from remote generations.

Yet, the Kings had done gross wrongs, so that the people had, from the eleventh century, forced from them charters and promises that they would do these wrongs no longer.

More than 30 times the Grand Charter had been re-enacted, and its vows re-taken, and lesser Charters—whose very grant proved the wrong the Kings had done—were sealed, in such numbers, that almost every decade had its

solemn proof of the falsehood of the maxim,—and trials, executions, and depositions had proclaimed the judgment of Britain, that Kings were not infallible,—that they were amenable to law.

Parliament, too, had passed "*Ex post facto*" laws; had repeatedly attainted men for crimes, by general and special bills, involving those, who had vested rights in property, forfeited by attainder, in the punishment of a crime of which they were innocent; had, as political legislators, in their heat of temper, prescribed unreasonable punishments, and penalties vastly disproportionate to the crime they would prevent; had, as *executive* or *political judges*, condemned men without sufficient evidence, and even without hearing; had, often, and with grave oppression, departed from the straight path of right and equal justice;

—And been condemned, within a generation, by subsequent Courts and Parliaments, who undid their acts, and recorded their judgments, that wrongs had been done.

Lord Coke had—almost in advance of the world—proclaimed a power which could protect absolute rights, and declared to Parliament itself, the limit of its power.

And—speaking with the inspiration of the times, having deeply pondered the elements of the English Constitution —Blackstone had announced his famous definition of Municipal Law, with its remarkable limitation: "Commanding what is right, and prohibiting what is wrong;"—but—another, and stronger declaration came: As the clear truth, purified by the fermenting turbulence of centuries, came a new nation's declaration, "that all men are created equal;" "—that, to secure their rights, governments are instituted "among men."

And, when this nation had taken its firm place among

the powers of the Earth, its People, "to establish justice" * * * and "secure the blessings of liberty to themselves and their posterity," ordained and established an organic law, wherein they vested in Congress certain legislative powers, therein delegated.

Preamble to Constitution, Art. 1, Sec. 1.

And soon after—that all might know where the Sovereign power remained, and that none, through ignorance, carelessness, mistake or fraud, might turn aside the course of justice, and infringe the liberty of them, or of their posterity—they solemnly declared a list of absolute and inalienable rights, to violate which, power is always most strongly tempted; and wisely added, that their enumeration should not deny or disparage the other rights, retained by the People.

Amendments, Art. 1 to 9.

SECTION XC.

The history, enactment and contemporaneous construction of the British Constitution.

The Saxons appear to have had more liberty, and a higher respect for private rights, than the nations of the continent; and after the conquest their ideas, like leaven, seemed to extend themselves through the mass of the nation, both conquerors and vanquished; causing a ferment, which, even to this day, presses upon exclusive privilege and brings to the light of absolute enjoyment, rights of the people.

In tumultuous form, in the Eleventh and Twelfth centuries, the people asserted, and the Sovereigns—then esteemed the absolute source of all power—granted Charters of promise that they would observe, and cause to be observed, their rights.

Omnipotent parliament did not then exist;—the King was the government. For his necessities, and to further his designs, for the purposes of State, revenues were raised, and laws were promulgated.

Yet, the people asserted rights even against him; and he acceded to those rights, which thus became the Common Law.

A century of agitation at length, in 1216, produced the Magna Charta, as we now preserve it. Wise—far beyond its date—it lives, as truth, alone can live.

Let us consider it:

2 Co. Inst., p. 1, (Title and Preamble) 2 chapter 1:

"We have granted, also, and have given to all the free "men of our realm, these liberties, * * *, to them and "their heirs * * * forever;"—and Lord COKE says of these words: "Nay, they extend also to villeins, for they are "accounted free against all men, saving their lords."
(2 Co. Inst. p. 4.)

"A free man shall not be amerced for a small fault, but "after the manner of the fault; and for a great fault after "the greatness thereof, saving to him his contenement; "and a Merchant likewise saving to him his merchandise; "and any others villein than ours shall be likewise "amerced, saving his wainage, if he fall into our mercy."
2 Co. Inst. p. 27. (Magna Charta, ch. 14.)

This act was made in affirmance of the common law. Glanville,—2 Co. Inst., p. 28.

This phrase, "salvo contenemento suo," appears first in Glanville, A. D.), and Bracton uses the same words (Liber 3, fol. 116, A. D. .) Fleta uses also the word "continentia" (Fleta, Liber 1, C.): "For, the significa-"tion: contenement signifyeth his countenance which he "hath together with and by reason of his freehold." * * "The armor of a soldier is his countenance, the books of "a scholar and the like."

"Salvo merchandisa suo. For trade and traffic is the "livelihood of a merchant.

"Salvo wainagio suo. Wainagium is the contenement "or countenance of the villein, and signifieth a cart, or "wain, wherewith he was to do villein service, as, to carry "the dung out of the site of the manor, and cast it upon "the land, and the like; and it was *great reason* to save "his wainage, for otherwise the miserable creature was to "carry it on his back." (2 Co. Inst., p. 28.)

Magna Charta, ch 17: "No sheriff &c., shall hold "pleas of our crown;" and Lord COKE adds: "for an "ignorant judge is an added calamity to the innocent." (Id., p. 30.)

Magna Charta, ch. 28: "No bailiff shall henceforth "put any man to his open law, nor to an oath upon his "own bare saying, without faithful witnesses brought in "for the same."

Ch. 29: "No freeman shall be taken, or imprisoned, "or be disseized of his freehold or liberties, or free cus- "toms, or be outlawed or exiled, or any otherwise de- "stroyed, nor will we pass upon him, nor condemn him, "but by the lawful judgment of his peers or by the law of "the land.

"We will sell to no man, we will not deny or defer to "any man, either justice or right.'

This extends to villeins, * * "for they are free "against all men saving their lords." (2 Co. Inst., p. 189.)

"Upon this chapter, as out of a root, many fruitful "branches of the law of England have sprung.

"It containeth nine several branches:

"1st. That no man shall be taken or imprisoned but "per legem terræ.

"2d. No man shall be disseized * * * that is, "dispossessed of his freehold, that is, lands or livelihood, "or of his free customs, but by the lawful verdict of his "equals, or by due course and process of law.

"3d. No man shall be outlawed * * that is, de- "prived of the benefits of the law, unless he be outlawed "according to the law of the land.

"5th. No man shall be in any sort destroyed, unless it "be by the verdict of his equals, or by due process of "law.

"6th. No man shall be condemned with like excep- "tion.

"7th. We shall sell to no man justice and right.

"8th. We shall deny to no man justice and right.

"9th. We shall defer to no man justice and right.

"No man shall be taken or imprisoned; attached and "arrested are comprehended herein."

"1st. That is, restrained of liberty by petition or sug- "gestion to the king, or his counsel, unless by indictment "of good and lawful men, when such deeds be done.

"2d. No man shall be disseized, &c. Hereby it is in- "tended that lands, tenements, goods and chattels shall "not be seized into the king's hands. * * * Nor "shall any man be disseized of his goods, contrary to the "law of the land. No man ought to be put from his live- "lihood without answer.

"3d. No man outlawed, that is, barred to have the "benefit of the law.

"5th. No man destroyed, &c. That is, forejudged. "* * * * Every oppression * * * by color of "any usurped authority, is a kind of destruction, *and it is* "*the worst oppression that is done by color of justice.*

"It is to be noted that to this verb, "destroyed," are "added the words "in any manner," and to no other verb "in this chapter; and, therefore, all things, by any man- "ner of means tending to destruction, are prohibited.

"As, if a man be accused or indicted of treason or

" felony, his lands or goods cannot be granted to any, *no*, " *not so much as by promise;* nor any of his lands or goods " seized into the king's hands before attainder; for when " a subject attaineth a promise of forfeiture, many times " undue means, and more violent prosecution, is used, for " private lucre, tending to destruction, than the quiet and " just proceeding of law would permit; and the party " ought to live of his own until attainder."

" (8.) Nisi per legem terræ: but by the law of the " land; that is, to speak once for all, by due course and " process of law (p. 46.) No man be put to answer with- " out presentment before justices, or of record, or by due " process, or by writ original, according to the old law of " the land. And aptly it is said in this act: 'per legem " terræ;' for in those cases where this law runneth not, " other laws are allowed in many cases, and not prohibited " by this act.

" For example, if any injury, robbery, felony or other " offence be done upon the high sea, 'lex terræ' extendeth " not to it; therefore, the admiral hath connusance " thereof, and may proceed according to the marine law, " by imprisonment of the body, and other proceedings " than have been allowed by the laws of the realm."

" Against this ancient and fundamental law, and in the " face thereof, I find an act of Parliament made * * * " By color of which act, shaking this fundamental law, it " is not credible what horrible oppressions and exactions, " to the undoing of infinite numbers of people, were com- " mitted by Sir David Empson and Edmond Dudley " being justices of the peace throughout England.

" But at the Parliament of 1 Henry 8 (chapter 6), this

" act of 11 Henry 7, is recited, made void, and repealed; " and the reason thereof is yielded that by force of said " act, many * * crafty * * * * informations " had been pursued against divers of the king's subjects, " to their great damage and wrongful vexation.

" And the ill success hereof, and the fearful end of these " these two oppressors should deter others from committ- " ing the like, and should admonish Parliaments, that, " instead of this ordinary and precious trial " per *legem* " *terræ*," they bring not in, absolute and partial trials by " discretion."

" Process of law is two fold, viz.: by the King's writ, or " by due proceeding, either in deed or in law without writ. " But if a man by (false) *color* of any authority * * ar- " rest or imprison a man, or cause him to be arrested or " imprisoned, this is against this Act, and it is most hate- " ful when it is done by countenance of Justice."

" (9.) Neither will we send him, &c. This is spoken by " the King, who, in judgment of law, is, in all his Courts " of Justice present, and repeating these words: *nulli* " *vendemus*, &c.

" (11.) We shall not sell, deny, or delay justice and " right. Neither the end, which is justice, nor the means " whereby we may attain the end, and that is the right.

" Right is here taken for law; 1st, because it is the " right line whereby justice distributive is guided and di- " rected, and 2d, because it discovereth that which is tort " and crooked or wrong; for, as right signifieth law, so " tort, crooked or wrong signifieth injury; and, *injuria est* " *contra jus*." against right. 2 Co. Inst., pp. 45 to 56.

Much more might be added from this learned commen-

tator, to strengthen and illustrate our argument, but I forbear, saying as he said of this law, that, of the law and his Commentaries in the above mentioned pages there on ; " the learned reader ought not to let pass any syllable " in respect of the excellency of the matter," and I pray Your Honors carefully to examine the commentaries upon this chapter, and supply with your reason the weakness of my speech.

The next Statute which we shall consider, is that of Marlbridge, A. D. 1267, and reign of Henry III.

2 Co. Inst. p. 102.

The causes of its enactment were, the many fearful and dangerous dissensions that grew originally out of this root, that the King sometimes allowed, and sometimes disallowed, Magna Charta, and Charta De Foresta.

And Lord Coke adds, that, after this Parliament, neither of said Charters was ever impugned or questioned.

2 Co. Inst., p. 102.

(Read Coke's comments hereon, of vast importance, p. 103 and 104.) This Statute establishes these things:

1st. That no officer of Government ought to be permitted to take the law into his own hands, to injure, imprison, or take into his own hands the property of any person, and therefore, all men, high and low, must be justified in all such acts by the judgments and warrants of Courts of Justice; "For the King hath distributed his judicial "power to his several Courts of Justice," (p. 103). "Which ought to determine all causes."

" 2d. That, except by the King's command, none may " be compelled to swear against their wills." (ch. 22).

"3d. That, without his special writ, none may compel a "a man to show the secrets and sinews of his title to "lands, or to give any information which may operate to "cause forfeiture or disseizure." (p. 142, ch. 22.)

Next, the Statute of Westminster Primer, 3 Edw. 1.

2 Co. Inst., p. 156.

Ch. 6. Enacts that no man shall be amerced without reasonable cause, and according to the quantity of his trespass, saving to him his livelihood, and that by his peers.

And Ch. 26 provides that no officer of the King, by color of his office, without special warrant, or authority certain, pertaining to his office, disseize any man of his freehold, nor anything belonging to his freehold. (p. 206.)

And the Statute of Westminster Second, 13 Edw. 1.

(2 Co. Inst., p. 445.)

Ch. 37. Affirming the Common Law, forbids strangers to be sent to take distresses, whereby the parties distrained, not knowing such persons, will resist the officers, and provides that distresses shall only be taken by bailiffs sworn and known.

And Ch. 38, (ibid., p. 447), curbs the powers of officers, because, by color of their office, they would tyrannize to *extort money.* ("*Pecuniam extorquere.*")

Thus we have examined, with considerable labor, the progress of the British Constitution during five centuries of turbulence, rapine and anarchy; we have presented nothing but those matters, which have been endorsed by Lord Coke, as integral parts of the Constitution of his time.

In times like those, rights granted and preserved, bear strongest evidence of their absolute and inalienable quali-

ties. Forced by the people from aristocracies and Kings, who were believed to be the Lieutenants of God (Reeves. 2 Co. Inst., p. 103), and empowered by him to rule, they overcame not only fear, custom and power, but also superstition, and, perhaps, religious reverence for God's anointed. And trodden down, though they might be, they were never trodden out. (Co. Litt, 279, b).

The reasons which the Statutes themselves contain, and which the learned commentator has collated, add to their force.

Because a man ought not to lose his all for a light offence, or to be grievously amerced therefor, therefore it was established as a right, that amercements and forfeitures should be proportionate to the offence, and then, only as assessed by a jury of their peers,—and that fines and punishments, which were fixed by the legislative power, should likewise be, only, in proportion to the transgression.

Because a man ought not to be destroyed in his estate, therefore it was established as a right, that amercements and forfeitures should not extend to his means of livelihood, even for a great fault.

To the freeholder should be saved his freehold, that is, his land *and means of livelihood*, and its benefits;—to the merchant his merchandise,—to the scholar his books,—to the mechanic his tools,—and even to the villein, the slave of the lord, should be saved his cart, that he be not degraded to carry dung upon his back. *Magna Charta*, Ch. 14.

Because a man ought to live of his own, until it be solemnly adjudged that he had forfeited it,—therefore it was established as a right, that he should not be dispossessed of his livelihood, his freehold his franchises or free customs,

but by the judgment of his equals, or by lawful process. And this lawful process, where forfeiture of freehold for crime, was had, was judgment of Attainder, and nothing less.

Magna Charta, Ch. 29.

Because every oppression, against law, by color of any usurped authority, is a kind of destruction, and the worst oppression is that done by color of justice; and because even Sheriffs had used their powers to extort money, and, with all sorts of inferior officers, had inflicted all sorts of wrongs and oppressions, even the most horrible,—therefore it was established, as the right of a man, that no officer might imprison him, or take possession of his estate, without a process from Courts of Justice, unless he had a Warrant in law, of which I will speak more at large hereafter. 2 Co. Inst., p 48.

Because an ignorant Judge adds calamity to the misfortune of the innocent; and because experience had proved that special tribunals, irregular arrests, and investigations and proceedings, where a witness or informer, or officer, also exercised the functions of a Magistrate, were dangerous to the liberty and safety of the people,—therefore it was established as a right, that process should only issue from, and examination and trial only take place before, the ancient and known Courts, according to the regular forms and proceedings thereof, by Judges learned in the law.

Because the opposite was an engine of oppression, therefore it was established as a right, that no man should be distrained, or required to furnish any evidence against his person or against his estate, except upon a special writ from Courts of Justice.

From this time, to 1774, these principles of right sustained little change; their practice was, however, largely advanced both by the revolution of 1688, and by the large advance of judicial science, as well as the advance in knowledge and appreciation of liberty by the people.

Lands were, by Common Law, forfeited only upon attainder (4 Bl. Com., 386), and this, then, related back to the time of the offence committed (4 Bl. Com., 381].

Till judgment of attainder was pronounced, a man might live of his own;—and by 7 Anne, Ch. 21, forfeiture of lands for treason was confined to the life of the traitor only.

For all the higher kinds of crime, and for flight, the goods and chattels had been forfeited upon conviction; but a traitor, or a felon even, might, *bona fide*, sell any of his chattles, for the sustenance of himself and family, between the fact and conviction (4 Bl. Com., 387); and it has become to be regarded as so disproportionate a penalty, that Blackstone remarks, that, of late years, forfeiture is looked upon as too large a penalty for the offence; therefore the jury seldom find the flight. And, affirming this change in the British Constitution, 7 and 8 Geo, 4, ch. 28, S. 4 directs, that, on trial of indictments for treason or felony, the jury shall not be charged to inquire concerning his lands, tenements, or goods, or whether he fled.

The Judiciary had become distinct, and superior to officers of the peace, who were their servants; the latter might arrest upon the warrant of the former, or upon the warrant in law. And this warrant issued out of the law, as from its source, 1st, when a crime was committed in the presence of the officer; 2d, when a felony had actually been committed, and suspicion pointed to any person, and

there was danger that the culprit might escape; and flight was always held to warrant such suspicion; 3d, on hue and cry. Yet, for the security of the subject, he might not be held without the warrant of the magistrate, to whom he must forthwith be taken.

From Lord Coke's time to 1774, the letter of the law sustained little change, though its practice greatly improved.

The exposition of Coke was cited as law.

We have also the contemporaneous testimony of Blackstone, writing in 1758,—of Reeves, in his History of the English Law, written just prior to 1787—and Hallam, in his Constitutional History, some 30 years later.

Mr. Hallam,—in speaking of the overstraining of prerogative, by Elizabeth,—says: "Yet, when the royal "supremacy was to be maintained, against a different foe, "by less violent acts of power, it revived the smouldering "embers of English liberty; the stern and exasperated "Puritans became the depositaries of that sacred fire" (Hallam, Const. Hist., p. 137); and they,—stern and inflexible, brought it across the ocean.

Had it slumbered, or been trodden out,—or had they any less ideas of their rights, and the rights of man, when, a century and a half later, they framed their Bill of Rights?

Fanueil Hall, and the Tea Party, Lexington, Bunker Hill, and eight years of war for freedom,—have written the answer in peril and in blood.

Our author continues: "Civil liberty in this kingdom "has two direct guarantees: the open administration of "justice, according to known laws, truly interpreted, and

" fair construction of evidence, * * * ; nor can the " subjects of any State, be held to enjoy real freedom, " where this condition is not found, both in its judicial in- " stitutions, and in their constant exercise.
(Hallam, Const. Hist., 138.)

And again: " The security of freehold rights has been " the peculiar boast of English Law. * * * The " name of freeholder, handed down, with religious honor, " from an age when it conferred distinct privileges, and " * * * protected the poorest man against his lord's " rapacity. * * His house was his castle, which the " law respected, and even the King dare not enter. Even " the public good must give way to his obstinacy; nor had " the Legislature itself, as yet, compelled any man to part " with his lands for a consideration which he was loath to " accept. (Hallam, Const. Hist., 253.)

And again: " We may advert to some other stretches " of power, which no one will pretend to justify: * * " A commission was issued, in 1635, to the Mayor of Lon- " don and others, to examine all persons going beyond " seas, and tender to them an oath of the most inquisito- " rial nature. * *

" Certain privy counsellors were empowered to enter " the house of Sir Robert Cotton, and search his books, " records and papers, setting down such as ought to be- " long to the Crown." (Hallam, Const. Hist., 254.)

" And a Secretary, by virtue of an order of the Coun- " cil, entered Lord Coke's house, while he was on his " death bed and took away his manuscripts and will.
(Roger Coke's Detection of the Court of England, I., 309.)

"And the high commission Court, by virtue of the "King's supreme power Ecclesiastical, examined many "upon oath, touching offences with which they were "charged, which oath many had declined to take, accord- "ing to the known maxims of English law.

Rymer XX, 190.

It will be observed that, in all these cases, the power was exercised, not by low bailiffs, or detectives of mean intriguing character and profession, but by men of high position and responsible standing. Yet, our author says: "No man will pretend to justify" such things.

Revolution and re-enactments of the spirit, as well as the letter of the Grand Charter, had swept them away, and, long before he wrote, they were execrated as violations of absolute right.

Are we not justified in saying, then, that in England, in 1774, it was esteemed but common and absolute right, that a man might acquire land, and protect it from all trespassers, by such enclosures as he would,—that he might acquire chattels and use them, without let or hindrance, provided he injured no one,—that he might acquire skill in trade, and exercise it for his own use, imparting it to no one,—that he might attain knowledge of Chemistry and Pharmacy, by secret experiment and labor, or from the teaching of others, and, keeping the knowledge secret, make it his means of livelihood, which none could take from him,—that no inquisitorial oath could be required,—that the presumption was, that his yea, was yea, and his nay, nay,—as to his intentions and dealings towards the State; and if any crime was committed by him, either in deed, or in this answer, it must be proved against him.

In short, that liberty was the rule, restricted only where absolutely necessary to the preservation of general liberty and safety,—and that a man's business, his household, his secret, his art, his papers, his chattels, and his freehold, he might enjoy, with none to molest, except as necessity commanded, and that necessity, could only be adjudged by a judicial officer, who, if a felony had been committed, or strong grounds of suspicion existed (and in no other case), might issue a warrant for the search of *certain* premises, for things or persons *also certain.*

The English Constitution is said to be an unwritten one. Again, it is said that Parliament may alter it, at pleasure, and again, that it is found recorded in the acts and decrees of Parliament.

Let us for a moment examine it, and mark what general departments are applicable to this country.

1st. of the derivation of power.

2nd. of its limitations.

In 1774, the doctrine of England was, that all power is derived mediately or immediately from the King.

Bac. Abr. title COURTS, "A."

Co. Inst.

1 Bl. Com., 266. 3 id. 24.

(And here we note that all powers, dependent purely upon this doctrine, fail in America, where all power reposes in the people, except as delegated to the departments of Government;—this is most important, and should constantly be borne in mind.)

In the 12th Century, all power being lodged in the King executive, legislative, and judicial, the people, as is said, "Sword in hand did force from King John" a charter of their liberties; and Henry II, after him, as a sole corpora-

tion binding himself, his heirs, and successors in office, and assigns forever, did, in form of grant, voluntarily enter into a compact with the people, that these powers should be exercised according to certain fixed and stated rules, and to a certain limit only. The things granted to the people and their heirs, became their rights forever;—Else what would the grant, compact, or contract be, if the one party could deny the rights of the other party to the thing granted?—what but a "nudum pactum," a void?—Something did pass by the grant. Revolution had succeeded, and many rights, which were according to Common Law, (Bracton.) and according to Natural Law, had vested perpetually in the governed.

The right to constitute the government and to provide for the administration of the powers, remaining in the King, within the prescribed limit, was still unlimited in the Crown. So, one by one, he constituted the high Court of Parliament and the lesser Courts, and prescribed their jurisdiction;—One by one he granted to Parliament his legislative powers.—Could he delegate more power than he had? Could he grant to his assigns that which had passed beyond his possession and vested of right in another?

Added, however, to this reason, we have the assent of repeated Parliaments to the original contract, its confirmation by the Kings, and its admission and affirmation by the Courts of Justice, and its proud assertion by every Englishman, as his birthright, and the inheritance of his children.

Thus, in every generation, the successors in office of Government, executive, legislative and judicial, on the one hand, and the people on the other, have, by assertion,

public use and consent, ratified the grant and confirmed the possession.

Parliament has, as successor to the absolute power of the King over this subject, reorganized the machinery of Government; but I cannot recall a single instance where it has ever attempted to repeal or withdraw the fundamental grants of Magna Charta.

By insidious approaches it may undermine the "fair "fabric of English liberty;"—or, because no higher power can call it to account, it might, claiming omnipotence, pass a law that these grants and liberties should be abrogated. If successful in either, revolution would have been accomplished, more radical than that of 1688, the English Constitution would have been subverted, its fundamental principle of "liberty of the subject," would have been uprooted, and absolute despotism have assumed its place,—till the people, "sword in hand," should force from Parliament, as they did from King John, acknowledgment of their absolute right,—and counter-revolution had remedied the wrong.

Can it be doubted, that, when the People threw off English obedience, assumed the Sovereignty and delegated a portion only, to Congress, reserving to themselves certain rights,—that they intended to reserve all those rights, which "eo nomine" had descended to them by inheritance through twenty generations?

The manner in which Parliament successfully proceeds in matters, infringing or altering the rights of a large class of citizens, is illustrated in the assertions of the Attorney General of England, in the argument of *Stockdale* v. *Hansard* (9 A. and E, 87) (36 E. C. L. 69,):

" Parliament has powers of so extensive a nature, that " many measures, which it is competent for the Legisla " ture to introduce, would not be submitted to, if there " were no means of explaining their objects to the people, " or pointing out their necessity,"—by which it would seem, that the right to rule depends on the consent of the governed, and that consent is implied, from the fact that they do not rebel.

SECTION XCI.

The Excise Laws of England.

The claim may be made, that the excise laws of England furnish precedents as to *lex terræ* in this class of cases, and take them out of the ordinary rule.

It will be observed:

1st. That, prior to 1774, there were almost no excise laws in England, which were in any respect parallel to the one under discussion.

2nd. That Parliament, moved by passion or momentary excitement, has repeatedly enacted statutes which were outrages upon the liberty of the subject, and, by subsequent resolution, upon their repeal, have been so pronounced;—and, therefore, the passage of an Act of Parliais not evidence in itself that the Act is good law.

3d. That, up to 1839, no law had been passed, authorizing indiscriminate search without warrant; and in support of this position, cite the following language of Lord Chief Justice Denman, in the decision of *Stockdale* v. *Hansard*, 9 Adol. & E. 114: "Nothing is more undoubted than the exclusive privilege of the people's representatives, in respect to grants of money and the imposition of taxes. But if their care of a branch of it should induce a vote that their messengers should forcibly enter and inspect the cellars of all residents in London, possessing more than a certain income,—and if some citizen should bring an action of trespass, has any lawyer yet said, that the speaker's Warrant would justify the breaking and entering?

"The Commons of England are not invested with more "of power and dignity by their legislative character, than "by that, which they bear as the grand inquest of the "nation.

"All the privileges, that can be required for the ener- "getic discharge of the duties, inherent in that high trust, "are conceded without a murmur or a doubt; we freely "admit them in all their extent and variety; but, if, on "resolution of guilt, voted by themselves, this grand in- "quest should not accuse, but condemn, should mistake "their right of initiating a charge for the privilege of pas- "sing sentence and awarding execution,—will it be denied "that their agent would incur the guilt of murder?"

This language or supposed case, was not absolutely necessary to the decision of the cause in question, yet, it is not far enough from it, to be denied as obiter. In a case, in which the powers of the House of Commons were directly in issue, after an argument of the most thorough and exhaustive character, a learned Chief Justice solemnly declares that the Legislative power of England,—exclusive touching the imposition of taxes,—*could not authorize even their own messenger forcibly to enter and inspect private property, for the purpose of making the impost effectual, or to prevent fraud.*

The language of the second portion of this question, aptly designates the position of Congress in the case before us,—mistaking the right of initiating * * * for the privilege of passing sentence, and awarding execution; will any one deny the liability of their agents for the trespasses committed under their warrant?

To return from this digression—

4th. Had the Parliament of England enacted such laws, would the continual acquiesence of the people, in the infliction of wrong upon a small class, too pusillanimous to vindicate their rights, form a safe precedent?

We have seen how this class has demeaned themselves in America; how, many have closed their establishments and submitted to loss, waiting for a turn in the times; how, a few have continued in business, and—with a swarm of outsiders, who have possessed themselves of distilleries, for the avowed purpose of earning the profits of fraud,—have preferred to compromise and purchase immunity. Yes, even after their establishments have been seized, and they imprisoned they have paid money to the Commissioner, and the Courts have permitted the suits to be dismissed. I say they have preferred to compromise and to barter for years, and to bear the insolence of prying spies and informers, rather than vindicate their rights in the Courts.

And is it to be supposed that they are more courageous in England, or that any, while he could buy justice measurably, would not rather pay, than commence a long litigation, whose ultimate appeal must carry his case before that very Parliament which had enacted the law, and which, exasperated at his contumacy, might carry even more passion into their judicial sentence, than had impelled their legislative act?

Should it be said that such things are not to be supposed of Parliament,—I will cite your Honors to the legion of violent Acts, recited in the very case of *Stockdale* v. *Hansard*, and in the authorities cited on other points, as well as to the fact, that in this case, in the year 1839, the Judges of the Court of Queen's Bench were threatened with com-

mitment for contempt, if they should assume to decide the question inconsistently with the views of the House.

It is said that "Lord Shaftsbury's case stands unim "peached, where care is taken to make a commitment by "Parliament, general." (Dwarris, 120.)

Yet, Parliament afterwards did impeach and reverse its own judgment. (6 How., St. Tr., 1310.)

And in a careful discussion of the tricks and suppressions of truth,—by which political ends were gained, and the liberties of individuals invaded, by the representative body of Government,—speaking of Parliament, Dwarris (p. 120) says:

"Men, in whom the bare necessity to stand sheltered, "under a technicality, would, in private life, excite the "suspicion that they were not following the pure and high "line of conduct,—who would feel that there was some- "thing abhorrent in withholding any part of the truth "and, most of all, that part which might rescue a prisoner "from confinement, yet, acting as a body, and influenced "by an "*Esprit du Corps*," the same men are carried "away by a desire of victory, and do not sufficiently "weigh the means for attaining the end. Others little "comprehend what they are doing, and would, if they "were compelled to judge of it, be very much ashamed of "the dexterity by which they succeed."

Having considered the wrongs done, our author, evidently knowing that his head was in the lion's mouth, draws a honeyed picture of the time when Parliament may "be found to magnanimously renounce, to spotane- "ously divest themselves of so *frightful* a power as the "use of commitments in a general form," and continues:

"General warrants they will not permit to the Crown,

"even in cases of high treason and rebellion; and in "calmer times they may renounce them, when they are "themselves in a squabble with a bookseller or an attorney."

"This would, at least, recommend their exclusive privi- "leges to the people."

"When the course of justice is allowed to flow unimpeded, "decisions are seldom unsatisfactory. (id- 22).

"In vain has the House of Commons attempted to place "its privileges on the footing of unquestionable and un- "limited power; * * * there is no power in the "Country above being questioned by law."

"Yet, it is to be remembered that, in ascending Courts "of error, the last resort of judicature is in the whole "Parliament—Kings, Lords and Commons—to correct all "mistakes and to repair every possible wrong." (id 123).

Returning again from digression, we say:

5th. That if there was anything in the excise laws of Geo. 3., or even prior to that time, which may be claimed as precedents for the Acts under discussion, the people of America absolutely refused to consent to them, and vindicated their refusal by successful revolt.

6th. Even in Britain, time enough had not elapsed in 1774, on which to presume an absolute consent of the governed. Revolts do not grow out of the enactment of Statutes, but out of their execution, until they feel the weight, the people will not rise to throw it off.

And again: the execution of such laws would press on a very small class in the community; like the Jews' Exchequer, in the time of Richard I and John, it presses on a very few, to the relief of the rest; and the whole people will not revolt to remedy the wrongs.

As did the Jews, so the distillers must feign assent; but this assent, being obtained by duress, is void.

A writ of Error, carried to Parliament, alleging for error in the Court below, that Judgment should not there have been rendered, because a law of Parliament was oppressive, and therefore void,—is unprecedented; and the suitors and Counsel, who would dare the arbitrary punishment of Parliament for such contempt, would be bold men.

So small a class could not rebel, therefore they must assent.

Thank Heaven!—Our ancestors placed the rights and liberties of the weak in safer charge, than the caprice or magnanimity of even Legislative bodies affords. They had seen the unflinching heroism of the Judiciary;—How, in the despotic times of Henry 8th, Courts of law had convicted his instruments and checked their power. (4 Reeves, 403);

How Coke had asserted, that men had rights, against King and Parliament, (Bonham's Case, 8 Co. Rep. 118), at a time when men were beheaded on the word of King or Parliament.

How Holt had affirmed the doctrine with "reasons "easier to outvote than to answer." (Lord Denman in Stockdale and Hansard.)

How an hundred other, lesser lights, had, at great peril, marked out the course of justice;—in a word: how the Judiciary had been the bulwark and preserver of all the liberty the people had; and—wisely, having seen these things, the people gave the Judges unquestioned power to check all oppresion and wrong, and gave all, high and low, strong and weak, a right to appeal to them.

7th. We will affirm that, even in England, acts of Parliament contrary to the laws of God and nature, and to right reason, are void. (Dwarris, 479, 480 et seq. to 485, and cases there cited.) Our author glosses over this doctrine, and attempts to turn aside the forcible expression, while the fact remains.

He says: "Absolute power must be placed somewhere, "and, to it, implicit obedience must be paid. It can no- "where be so safely placed as in the hands of those who "make the laws, * * * though the laws they estab- "lish may sometimes be pernicious,"—and continues (p. 484):

"English lawyers adopt a cautious and characteristic "mode of proceeding, where a law leads to absurd conse- "quences, or an infraction of natural law; they do not "proclaim the law itself void; they only hold it inapplica- "ble, and declare the particular case excepted out of the "statute."

So both get at the truth; Lords Coke and Holt say, the law is void and of no effect, and the cautious ones say, Parliament did not intend the law they made, therefore it is as if no law was made quoad hoc,—and of no effect.

I would like to know what difference there is in the two cases, except what always appears when cowardly circumlocution and clear logic come to the same conclusion

8th. Parliament, of natural right, cannot be a judge in matters of right claimed under Magna Charta,—for this,—that it is one of the parties to the contract, and when the other party appeals to law, it becomes a judge in its own cause; therefore, its judgments and opinions in its own favor are not to be taken as precedents. And, in de-

fault of precedents or construction, we must seek the meaning of the instrument in its text alone.

9th. It will further be observed that, the cases under the excise laws of England, were decided on other points than those objected by us. We will briefly consider them:

1st. *Cooper* v. *Boot* (4 Doug. 338), 26, E. C. L. 512, A. D. 1785. The statute, 10 George I., ch. 10, laying a duty on tea and coffee, had provided, that, in case any officer &c., shall have cause to suspect, any coffee &c., shall be fraudulently hid &c., then, upon oath made by such officer, before the commissioner of excise, or before two justices of the peace, setting forth the grounds of his suspicion,—it shall be lawful for the commissioner or justices, if they shall judge it reasonable, by special warrant, under their hands and seals, to empower such officer to enter into all and any such place or places &c., and seize and carry away such coffee &c.

Cooper had obtained such a warrant and entered the house of Boot, and there, broke into certain inner rooms which Boot refused to open, but found nothing,—and Boot brought an action of trespass.

The action was based upon decisions that, under a writ of assistance, goods must be found, to justify entry; and on other cases, leaning towards the same doctrine in case of a warrant. These later were reversed.

The Court, Lord MANSFIELD, C. J., decided:

1st. That in case of a writ of assistance there is no warrant, and all is left with the discretion of the officer; besides which, a positive clause in the statute makes the whole depend on the finding of the goods; therefore, the rule does not apply.

2d. If the magistrate thinks there is a sufficient ground of suspicion, he is bound to grant the warrant; if not, to refuse it; and his judgment is decisive on this point. The officer is bound to execute the writ; "we are all of us "therefore, of the opinion, though against great authority, "that, for the due execution of a legal warrant, the officer "cannot be made a trespasser." And, as this was the only question raised, this is the entire purview of the decision.

The King v. *Steventon*, 2 East., 362, A. D. 1802,

1st. Decided a question of practice in the commissioners' Court, because, according to the constant practice for 30 years, and in conformity with the practice of the superior Courts.

2d. That a clause in the statute, regulating informations to a Court of record, did not extend to actions in inferior Courts.

The King v. *Skone*, 6 East., 514, A. D. 1805,

On judgment upon a statute of 1802, decided a question tion as to practice, that there is no appeal from the judgment of two justices in the case for a penalty.

The King v. *Rogers*, 10 East., 566, A. D. 1809, construes certain statutes, passed after the year 1800.

The King v. *Chandler*, 14 East., 267, A. D. 1811,

The officers made search, by virtue of a magistrate's warrant, and found a still fraudulently concealed under a pig stye.

The defendant was summoned, as the court decided, duly,—and made default; and upon trial, judgment was entered which, it was decided, stated the offence suffi-

ciently; but the Court quashed the conviction, because it did not appear that the offence was committed within the jurisdiction of the justices.

It is unnecessary to extend the examination further; all are of this character, and based upon the assumption that the excise commissioners were regular magistrates; and the questions raised, are touching their practice, and that of other magistrates, in issuing warrants, and the proceedings of officers thereunder.

I believe the point has never been made, in England, on the power of Parliament to create these special jurisdictions, or to command or forbid malsters wet their malt within a certain time, or do any other act which Parliament in their good pleasure might command;—and, considering the characteristic caution, of which Dwarris speaks, together with the magnitude of the matter, and the hesitation which all good judges feel toward declaring a statute void,—it is quite certain, no Court would volunteer to moot and decide such a point.

Should such Statutes—as 1 Jac. I, ch. 22, (cited as the foundation of *Mason* v *Middleton*, 3 East., 344), authorizing the leather searchers to enter the houses of dealers in leather, and examine and search for all badly tanned, or badly wrought leather, and seize such as they should find,—be cited,—we answer:

1st. That, though Lord Shaftsbury's case was impeached by Parliament, its rule was supported as law, viz: that, as Parliament might issue general warrants, this Statute formed a complete warrant to its officers to do what they did;—and that all general warrants from any source are forbidden in the United States Constitution.

2nd. That, in the only case I find touching this Act, the question of the right to issue such a warrant, and of the officer to search under it, was not raised; and the Court decided the case on other grounds, against the operation of the Statute.

3rd. That, if such power, as is conferred by this Act, is defensible at all in this country, it is as a Police regulation, and that the article may be taken and destroyed as a nuisance,—a matter entirely under State regulation.

SECTION XCII.

The Colonists retained all the rights of English Freemen.

The Colonies retained to themselves and their posterity all the rights of English freemen, guaranteed by compact with the Government, *i. e.*:

Charter of Virginia, A. D.	1606 and 1609.
Charter of Massachusetts,	1629.
Charter of Maine,	1639.
Charter of Connecticut,	1662.
Charter of Rhode Island,	1663.
Charter of Maryland,	1632.
Charter of Carolina,	1663.
Charter of Georgia,	1732.
Proprietary grant to New Jersey,	1665.

(See also authorities, cited 1 Kent's Com., 611, note; Lecture 24, marg. p. 2).

Chancellor Kent, after a careful examination says: "The history of our Colonial Government bears constant "marks of the vigilance of a free and intelligent people, "who understood the best securities for political happiness, "and the true foundation of the social ties." (*Ibid.*)

"The right of trial by jury, and the necessity of due "proof preceeding conviction, were claimed as undeniable "rights; and it was further expressly ordained, that "no person should suffer, without express law, either in "life, limb, liberty, good name, or estate; nor without "being first brought to answer by due course and process "of law." (*Ibid.*)

New York spoke, with no uncertain sound, through her General Assembly, in 1691 and 1708: "That imprison-" ment of subjects without due commitment for legal cause "* * * and forcibly seizing their property, were illegal and " arbitrary acts" * *. That it was "the unquestionable " right of every freeman, *to have a perfect and entire prop-* " *erty in his goods and estate.*" (Ibid. marg. p. 3, and note.)

" It was regarded and claimed, by the General Assem-" blies of all the Colonies, as a branch of their sacred and " and indefeasible rights, that the exclusive power of taxa-" tion of the Colonies resided in their representatives " only, and that the people were entitled to be secure in " their persons, property and privileges, and that they " could not lawfully be disturbed or affected in the enjoy-" ment of either, without due process of law, or the " judgment of their peers. (Ibid. p. 4, and note.)

I can add nothing to the first twelve pages of the Chapter, nor can I give it weight by a recitation of the authorities there quoted. It would be immodest in me, at this day, to attempt to add to, or take from the conclusions of one, who, added to great learning, careful research and long experience as a jurist, had also the aid of daily acquaintance with the very men who formed the Constitution, and an intimate knowledge of the character of the whole people, and their contemporaneous construction.

SECTION XCIII.

Colonial interpretation of those rights.

Before leaving this division of the case, I wish to call your Honors attention,

1st. To the broad construction, put on the rights of property, by the framers of the Constitution, viz: *That it was the unquestionable right of every freeman, to have a perfect and entire property in his goods and estate.*

2nd. Up to 1765, Parliament had never attempted to extend the operation of any internal tax, impost or excise to the Colonies;—that, upon its contemplation Virginia, at once protested, as follows:

The memorial * ** represents that, your memorialists, "hope an application to your Lordships, the fixed and her- "editary guardians of British liberty, will not be thought "improper at this time, when measures are proposed, sub- "versive, as they conceive, of that freedom, which all men "* * * have a right to enjoy * * *,—for your Lordships "protection of their just and undoubted rights as Britons. "* * * As our ancestors brought with them every right "and privilege, they could with justice claim in their "mother-kingdom,—their descendants may conclude that "they cannot be deprived of those rights without injustice."

(Wm. Wirt's Life of Patrick Henry, p. 449, Appendix A.)

And the other Colonies followed her example; and upon the passage of the Stamp Act, in 1765, Virginia again announced the true principles, thus: *Resolved*:—"That the "first settlers of this Colony and Dominion, brought with

" them, and transmitted to their posterity, and all other **
" subjects inhabiting this Colony, all the privileges, fran-
" chises, and immunities, that have at any time, been held,
" enjoyed and possessed by the people of Great Britain.
(Id. 74 et seq.)

The other Colonies soon followed (Id 85), and made such recommendations to the people—that the whole people, acting thereon, prevented the operation of the Act, altogether.

Attempts to dragoon them into obedience, brought on the Revolution, and ultimate vindication of these principles before the world. (See Ibid. Section 3, further.)

3d. The people of the Colonies believed that all their rights were absolute, as against King, Lords or Commons, or all together;—that an Act of Parliament, contravening them, was an usurpation, " unconstitutional" and void. (See especially, the Virginia petitions, and resolutions, using these words.)

4th. They believed that the passage of an Act of Parliament formed no evidence, that it had a right to pass such an Act, or to draw from it a precedent for Acts infringing the liberties of the people.

Witness the arraignment of Parliament for gross usurpations, unwarranted assumptions of power, and denial of rights, and appeal to war,—the only jurisdiction cognizant of the parties, and subject matters.

5th. That the form of the arraignment for usurpation, included all minor usurpations, both in England and this country, and the judgment, being for the whole indictment, included the lesser as well as the greater.

Therefore, no criminal Acts of Parliament, so proven, can be made a precedent to justify like acts in our Government. And it cannot be presumed that the people intended to authorize the legislature to do any Act, which they had with such labor and solemnity just branded as a crime.

I need not more especially refer to the searches and seizures, which were actually made in this country; their number was not large, and they are familiar to the general Student of American History; Courts of Admiralty, extending to the land their jurisdiction and forms and practice, were an especial grievance worthy of note.

SECTION XCIV.

Justice and Liberty—The Rights of Men in Society, as declared by the Constitutions of the Original States.

We will now examine the Constitutions of the several States, which, in many instances, point out more particularly some of the rights reserved to the people, and, afford strong presumption, that the people who framed them, and stated their rights so solemnly, intended to include them among those rights, not specifically enumerated in the National Constitution, which were reserved to the people.

The preambles may be relied on, as guides to the intention of these organic Laws (Dwarris, 503, et seq.); and in case of Constitutions, as they are adopted with as much care as any other portion of the Law, they possess far greater weight, than in other Statutes attaches to them.

The Constitution of Georgia, 1798, had no detailed Bill of Rights.

In that of North Carolina, Dec. 18, 1776, we read, Section 44, "The Declaration of Rights is a part of the "Constitution of this State, and ought never to be vio- "lated, on any pretence, whatever."

The Constitution of Virginia, adopted in 1776, is not within my reach; we may be sure it is up to the resolutions of their Assembly.

That of Pennsylvania, A. D. 1790, is almost contemporaneous with the National Constitution; we find therein,

Art. IX: "That the general, great and essential principles " of free government may be recognized and unalterably " established,—We declare that (Sec. 1): all men are born " equally free and independent, and have certain inherent " and indefeasable rights, among which are those of enjoy- " ing and defending life and liberty, of acquiring, possess- " ing and protecting property and reputation, and of pur- " suing their own happiness."—Sec. 2: " All power is in- " herent in the people, and all free governments are found- " ed on their authority, and instituted for their peace, " safety and happiness."

Sec. 26: " *To guard against transgressions of the high* " *powers which we have delegated,—we declare that every-* " *thing in this Article is excepted out of the general powers* " *of Government, and shall forever remain inviolate.*"

The preamble of the Constitution of New Jersey, A. D. 1776, July 2d, reads:

" Whereas all the Constitutional authority ever pos- " sessed by the Kings of Great Britain, over these Colo- " nies, or their other dominions, was, by compact, derived " from the people, and held of them, for the common in- " terest of the whole society, * * and whereas Geo. " 3. * * * has refused protection to the good people " of these Colonies, and, by assenting to sundry Acts of " the British Parliament, attempted to subject them to " the absolute dominion of that body, and has also made " war upon them, in the most cruel and unnatural manner, " for no other than, asserting their just rights,—all " civil authority under him, is necessarily at an end; " and a dissolution of government in each colony, has " consequently taken place."

New York, April 20, 1777, in her Constitution, said: "Whereas many tyrannical and oppressive usurpations of "the King and Parliament, on the rights and liberties of "the people, have reduced them to the necessity of intro- "ducing a government, * and Whereas the dele- "gates of the United American States, in general Con- "gress convened, did, on the 4th day of July, now last "past, solemnly publish and declare, in the words fol- "lowing, viz:" (Here follows the Declaration of Inde- "pendence, *verbatim*).

"And, whereas, this Convention, having taken this de- "claration into their most serious consideration, did * * "unanimously resolve that the reasons, * * therein "* * assigned, are cogent, and conclusive, we approve "the same, and will, at the risk of our lives and fortunes, "join with the other Colonies in supporting it."

"1st. No authority shall, on any pretence whatever, "be exercised over the people, but such as shall be derived "from or granted by them."

"3d. And, whereas, laws, inconsistent with the spirit "of theConstitution, * * "may be hastily and unad- "visedly passed,"—a Council of revision is constituted.

"13th. No member of this State shall be disfranchised "or deprived of any of the rights or privileges secured to "subjects of the State, by the Constitution, unless, by the "law of the land, or the judgment of his peers."

The people of Connecticut (1818). "To perpetuate and "secure the liberties, rights, and privileges which they have derived from their ancestors,—ordain, &c., &c."

"Art. 1, S. 1: All men, when they formed the social "compact, are equal in rights."

"S. 8—forbids search without particular warrant.

"S. 12: All courts shall be open, and every person "* * * * shall have remedy * * * without "sale, denial, or delay."

Rhode Island had no Constitution till 1842.

Massachusetts, 1780: "The end of Government is to "secure the existence of the body politic, to protect it, "and furnish the individuals, who compose it, with the "power of enjoying, in safety, and tranquility, their natu- "ral rights, and the blessings of life."

Part 1: A declaration of the rights of the people.

Art. 1: All men are born free and equal, and have cer- "tain natural, essential and inalienable rights, among "which may be reckoned the right of enjoying and de- "fending their lives and liberties, that of acquiring, pos- sessing and protecting property, &c.'"

Sec. 10, affirms the natural law of equality of burden.

Sec. 11: "Every subject * ought to find a certain "remedy, by having recourse to the laws for all injuries or "wrongs * * * to person, property, or character "* * freely * * completely * promptly and without delay."

SEC. 12. No subject * * shall be compelled to accuse or furnish evidence against himself.

Sec. 13: "In criminal prosecutions, the verification of "facts in the vicinity where they happen, is one of the "greatest securities of the life, liberty and property of the "citizen.

"Sec. 14. "Every subject has a right to be secure from "all unreasonable searches and seizures of his person, "his papers and all his possessions;—all warrants, there-

" fore, are contrary to this right, if the cause or founda-
" tion of them, be not previously supported by oath or
" affirmation; and, if the order, in the warrant to a civil
" officer, to make search in suspected places, or to arrest
" one or more suspected persons, or to seize their property,
" be not accompanied with a special designation of the
" persons or objects of search, arrest or seizure; and no
" warrant ought to be issued, but in cases, and with the
" formalities, prescribed by the law."

Sec. 18. " A frequent recurrence to the fundamental
" principles of the Constitution are absolutely necessary
" to preserve the advantages of liberty, and to maintain a
" free government."

New Hampshire, 1792:

Part 1: Bill of Rights.

Art. 1. " All men are born equally free and independ-
" ent; therefore all government, of right originates from
" the people, is founded in consent, and instituted for the
" general good.

Art. 2. " All men have certain natural, essential and
" inherent rights, among which are * * * acquiring,
" possessing, and protecting property.

Art. 3. " When men enter into a State of society, they-
" surrender some of their natural rights to that society, in
" order to insure the protection of others. And without
" such an equivalent the surrender is void."

Art. 10. " The doctrine of non-resistance against arbi
" trary power, is absurd, slavish and destructive of the
" good and happiness of mankind.

Art. 12, affirms the natural law of equality of burden.

Art. 14, affirms the right to remedies, complete, free, and prompt.

Art. 15. "No subject can be compelled to accuse, or "furnish evidence against himself."

Art. 18. "The true design of all punishment is to re- "form, not to exterminate mankind."

Art. 19. "Every subject hath a right to be secure from "all unreasonable searches and seizures, of his person, his "houses, his papers, and all his possessions, therefore, all "warrants to search suspected places, or to arrest a person "for examination or trial, in prosecution for criminal mat- "ters, are contrary to this right, if the cause or founda- "tion of them be not previously supported by oath or af- "firmation; and if the order, in a warrant to a civil officer, "to make search in suspected places, or to arrest one or "more suspected persons, or to seize their property, "be not accompanied with a special designation of the per- "sons or objects of search, arrest or seizure; and no war- "rant ought to be issued, but in cases, and with the for- "malities prescribed by law."

Art. 38. "A frequent recurrence to the fundamental "principles of the Constitution is indispensibly necessary "to preserve the blessings of liberty and good govern- ment."

ETERNAL VIGILANCE IS THE PRICE OF LIBERTY.

We are encouraged, by New Hampsnire, not slavishly to submit to arbitrary power, but boldly to demand pro- tection and redress of wrongs.

By New Hampshire also, and Massachusetts, we are told that frequent recourse to the fundamental principles are absolutely necessary not only to preserve our own lib- erty, but also to maintain a free government.

By Pennsylvania, New York, Massachusetts and New Hampshire, we are assured, that all men have the natural and inherent right of acquiring, possessing and protecting property.

By North Carolina we are told that the erection of Courts of Special Commissioners, for the trial of cases of a special nature, is illegal and pernicious (Declaration of Rights), and ought never to be done, on any pretence, whatever. And further that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. (Ibid.)

By New York we are told, that the Declaration of Inpendence is no rhetorical flourish, but a living reality,—the absolute and well considered belief of her people.

By New Hampshire we are told that the powers of government arise from compact with the people.

And by New Hampshire,that when their reserved and, absolute rights are neglected, or infringed by the State the compact is broken.

Massachusetts and New Hampshire affirm that no other than an equal proportioning of taxes upon all, is justice.

All affirm the freedom and equality of all men, and their right to pursue their own happiness, that all governments are instituted for the general good, protection, reputation and comfort of every citizen.

Massachusetts and New Hampshire tell us that no man can be compelled to furnish evidence against himself, and that every man ought to find a certain free, complete, and prompt remedy, for all his wrongs, in the administration of justice.

New Hampshire affirms the true design of punishment

to be, to reform mankind,—and, as an inference, that all men have a right to punishment upon that rule, and no other.

Connecticut, New Hampshire and Massachusetts particularly describe the only manner in which search of houses, papers, or possessions can be made, consistently with liberty.

And New Jersey justifies rebellion because *Parliament assumed absolute power.*

In all these we have the contemporaneous construction of the Federal Constitution, by its framers.

Why are we called upon to go back to these old familiar matters, and state these trite and musty facts?

It is, because our liberty rests upon them. And revenue officers, and even the august representative bodies of the nation, have, in their desire for victory over a few bad distillers, forgotten that they strike the good with the bad, as they follow the example of George the Third and his Parliament, entering, for success, a labyrinth of wrong, and undermining the foundations of Justice and Liberty.

SECTION XCV.

Liberty and Justice as Adjudicated.

The next division of our case brings us to examine reported cases, which may throw additional light on our investigations.

Commonwealth of Massachusetts v. *Dana*, 2 Metc. 329. If the keeping of lottery tickets, and books necessary to the purpose of drawing a lottery, is a crime,—a warrant (upon complaint, on oath, showing sufficient cause of suspicion that the same are concealed in a particular place), commanding the officer to search the premises named, for, and seize, the lottery tickets and materials for a lottery there found, is valid,—and the books and tickets, so seized, may be used as evidence on the trial of the indictment. It is not compelling a man to furnish evidence against himself, any more than seizing stolen goods, and using them in evidence.

The right to search for and seize private property is unknown at common law. (p. 334 and 5,—citing *Entick* v. *Carrington*, 19 Howell, St. Tr. 1029.)

The defendant's possession being unlawful, the books and papers were liable to be searched for and seized, as belonging to the *corpus delicti*, or to prevent further violation of law. (p. 337.)

(Note.—The seizure is justified, because, the books, &c., seized form the body of the fault, and their possession like that of stolen goods, is a crime; therefore *Entick* v. *Carrington* did not apply.)

In the case before us, fraud upon the revenue is the body of the wrong;—the books and papers are, at best, imperfect circumstantial evidence; and their possession entirely lawful.

And further, compelling a man to keep them in a particular way,—so as to show his fraud, if obtained by the prosecutor by fair means, or foul,—is compelling a man to furnish evidence against himself.

Our case further holds this the true rule:—a defendant is not to be convicted by circumstantial evidence, if all the facts proved, can be reasonably accounted for, without inferring the defendant's guilt. (p. 340.)

Commonwealth v. *Lottery tickets*, 5 Cushing, 369;

The statute prescribed that, when certain articles were seized by virtue of a search warrant, they should be kept &c., for evidence, and afterwards destroyed, under the direction of the Court.

Held that where things, not *mala in se*, were seized on a warrant, unlawfully issued or executed, the statute confers no authority for their destruction. (p. 375.)

Fisher v. *McGirr*,
Commonwealth v. *Albro*,
Herrick v. *Smith*,
} Massachusetts. 1 Gray, 1,

hold (pp. 44 to 46) that, if a statute does not require a legal warrant to be issued, and legally executed, and a legal trial had thereunder, no care, in the magistrates, fully to comply with the law in these particulars, can make the statute good (p. 48 &c.), but the proceedings under it, are void. The statute can give the magistrate no jurisdiction; and the officer acting under his warrant is liable for trespass.

Also:

1st. The warrant to seize and search for goods, the keeping of which is criminal, must state the name of the criminal.

2d. It must limit the articles to be seized, by quantities, or marks.

3d. It may not leave to the officer any discretion, as to what goods he may seize, as that he may seize any, he suspects to be liable to forfeiture.

Failing in either, it is an unreasonable search or seizure.

"If these modes of accomplishing a good and laudable "purpose, and of carrying into effect a good and whole-"some law, cannot be pursued without violation of the "Constitution, they cannot be pursued at all." (P. 31.)

(*A fortiori*, a seizure under this revenue law, where oath, and warrant are not required, is bad.)

Next: these cases hold,

That a seizure, upon the oath of three freeholders ex parte, which throws the burden of proof upon the owner of the property, to prove himself guiltless, is wholly inconsistent with the right of defending one's property, and of finding a safe remedy in the laws.

That the things confiscated and destroyed are property (p. 47); that they are taken away from the citizen as a punishment for crime, and that he has a right to every presumption of innocence, and full proof of guilt before a jury, before it can be taken from him. (P. 35.)

It will be observed that these cases do not hold that the legislature can, by its declaration, make any property a nuisance to be destroyed. Nor do they decide that a proceeding *in rem*, is a proper method of enforcing obedience

to a useful law,—but merely suppose they are; in order, having waived these points, to decide the cases on other grounds.

The case further holds (pp. 36 &c.) that provisions, parallel to those of the revenue law, are unconstitutional and void, because the statute makes no provision for the trial and proof of the offence of fraud, in any sense. in which a judicial trial is understood: in which the party, charged with the offence for which his property may be taken from him, may stand on his defence and have the presumption of innocence, until proofs are adduced against him to establish the crime with which he is charged.

Such a trial alone can satisfy the express provision, "No man shall be deprived of life, liberty, or property "without due process of law,"—as understood, from Magna Charta to the present time. The case holds further that, if this applies to and protects the guilty, it applies with greatly increased force to protect those who were strangers to his guilt.

It would seem, almost, as if the statute of 1868 was framed in express defiance of the above cases.

These decisions are affirmed by *Donovan* v. *Vicksbury*.

26 Miss., 248.

3 Kern, (N. Y.), 378.

6 Ind., 501.

9 Ind., 494, 510, 557,—and, by Judge Redfield, who is at least one-half the Court, in 1 Williams, 328 and 194.

And in Rhode Island, in 1 Curtis, 311; 2 do, 187; 3 R I., 64. Five States and a half, against Connecticut, Maine, and the other half of Vermont.

See also: On the right to, and incidents of a jury trial.
People v. *Kennedy*, 2 Parker, (C. R.) 312, p. 317, et seq.
Saco v. *Wentworth*, 37 Maine, 165.

The cases in Connecticut and Maine and Vermont are supported by a forced logic, which can weigh little against the cogent reasoning which compelled the Courts of Massachusetts, New York, and Rhode Island, to decide as they did. The judges of these courts are as pure and temperate men as in the others; but they would not allow their prejudices, or fears, to control their reason, and did right in a matter they would gladly have had otherwise.

If a statute, faithfully executed, works the divestiture of rights in, or an essential loss or destruction of or in the property at which it is aimed, it is void.
Wynehamer v. *The People*, } 3 Kern, 378, p. 387.
Toynbee v. *The People*, } per Comstock, J.

Ham v *McClews*, 1 Bay., 93, derives much of its force in this instance, from the fact that it was decided Oct. 30, 1789.

An Act of 1788 had forbidden the bringing of any slaves into that State (South Carolina), under the penalty of forfeiting every such slave, and paying to the use of the State £100.

McClews, ignorant of the Act, having been advised that no such law existed in that State, and being in danger of famine on Honduras Bay, brought his family and seven slaves into the State; and this suit was brought for the

forfeiture. By the Court:—"It is clear that Statutes, "passed against the plain and obvious principles of com- "mon right and common reason are absolutely null and "void. In this case we have an Act before us, which, "were the strict letter of it to be applied, would be evi- "dently against common reason."

This is the doctrine of Bonham's Case, 8 Co. Rep., 18, and cases there cited;

Stockdale v. *Hansard*, 9 A. and E., 1, (36 E. C. L., 13.)
Case of the Sheriff of Middlesex, 11 A. and E., 273; 39 E. C. L., 170, 171;
(Denman, C. J., 283 et seq.) and cases cited.

If absurd consequences, or those manifestly against common reason, arise collaterally ont of a Statute, it is void pro tanto.

Morrison v. *Barksdale*, Harper, 101.

An Act, which authorizes a criminal proceeding upon complaint of no person in particular, is void. And an Act, inflicting a penal forfeiture, which does not require notice to the owner in due course of law, of the reason and cause of the accusation, by reason of which a forfeiture is sought, is inoperative.

Greene v. *Briggs*, 1 Curtis, C. C., 311.
Greene v. *James*, 2 " " " 87.
State v. *Snow*, 3 R. I., 64.

In all criminal cases, the complaint must be certain in substance and in form.

Commonwealth v. *Phillips*, 16 Pick, 215.

The Sections of this Statute, laying taxes for the support of the Government, are those requiring every distiller

to pay 50 cents per gallon, and $4.00 per barrel on proof spirits, and a certain amount on licenses.

The fines, forfeitures and imprisonments are not taxes, but penalties for crimes committed. (If not, what are they?) The property penalties do not go to the support of the Government; they are only imposed in case he shall violate some provision of the law. Any prosecution for them, is, therefore, a prosecution for the penalty of a crime, and is a criminal case, a criminal prosecution.

In *Carson* v. *Commonwealth*, 1 Marshall (Ky.), 290, Defendant was charged in the County Court with giving the Commissioner of the Tax a false and fraudulent list of his taxable property. The Statute required this Court, upon defence made, to inquire into and decide the contest.

The Court, without a jury, found the defendant guilty, and imposed a fine, and treble tax;—upon error, it was held that the issue ought to have been tried by a jury, and judgment was reversed.

See also, *Fetter* v. *Wilt.*, 46 Pa., 457.

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SECTION XCVI.

Natural Philosophy and Practical Manufacture.

When grain is in its natural state, it contains insoluble starch, gluten, albumen, &c. The commencement of germination converts the gluten into *diastase*, whose presence, then, converts the starch into grape sugar; the constituents of each are: Carbon, Hydrogen and Oxygen (C 12, H 10, O 10, representing starch; C 12, H 14, O 14, representing grape sugar.) The presence of dilute acids have a like result upon the starch.

If grain is ground, wet, and submitted to the presence of the diastase, the same process commences; but, as the starch decomposes, the albuminous portions of the grain also decompose, and commence fermentation, in which the grape sugar joins, and releases a considerable portion of its carbon and oxygen in the form of carbonic acid gas, which process converts the sugar into alcohol; but the process does not stop here; for, the presence of fermenting matters disposes the alcohol to absorb oxygen, and the result is acetic acid, which, being diluted with some 50 times its bulk of water, is vinegar.

These natural processes are those used in making alcohol; and the chemist, in his laboratory, with the best appliances and great skill, can withdraw nearly all the starch from grain, and convert it into alcohol.

In ordinary distilleries, however, from 100 to 4,000 bushels per day, are ground, and submitted to a crude process;—and as all the above processes can, and naturally do, take place at the same time, the result must depend on many causes.

In examining the Act, it will be noticed that 45 gallons of mash shall represent a bushel of grain: that is, the Statute assumes that each bushel of grain, having been ground and not sifted or bolted, will be stirred into about 35 gallons of water, making about 45 gallons of mush, or mash. This, having the fermenting principle applied to it under the name of yeast, which is intimately mixed with it, with care, in the great mash tub,—is drawn into the fermenting tubs, holding, for example, 10,000 gallons (250 barrels) each.

A thousand accidents will, of course, affect this seething mass: If the tubs are sour, or the grain was foul, the temperature too high, or too low, when "set;" or should become so from surrounding temperature; or, if a thunder storm should fill the mash with electricity and its chemical influences,—a fermentation will probably take place, souring, rotting, decomposing the matter, or it may for some days, remain unchanged;—but none of these things produce much alchohol in a condition to be reached.

If, however, the yeast was good, and the accidents propitious, the first fermentation will have been completed at the end of from 60 to 80 hours, and the "ripe mash" or "beer" will contain about 8 per cent. of alchohol.

Under the Statute, (S. 4,) the tax attaches "to this sub-"stance as soon as it is in existence as such, whether it is "subsequently separated as pure or impure spirits."

Distillation of the ripe mash is not the ordinary, perfect process, to which we are accustomed in the Laboratory, but is partial only. A "charge" is placed in the large wooden retort, called a still, and heated; and as alchohol volatilizes at a much lower degree than water, it will evaporate before the fluid has reached the boiling point of

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water; but so great is the affinity of alcohol for water, that it will take with it about three times its volume of water, making low wines.

(Chemists say that no process of distillation, however perfect can separate all the water from alcohol, or produce spirit more than 90 per cent. pure:—the remaining ten per cent. of water can only be extracted by complex processes.)

The present, usual mode of obtaining higher proof is, to place these low wines, cold, in a wooden retort, called a doubler,—divide the large still into three chambers or retorts, in the upper of which the "ripe mash," or "beer" is placed,—in the second is beer, which has passed through the first chamber,—and in the third is beer which has passed through both the other chambers. Steam is applied to the third, and it is boiled by it. The vapor from this chamber is passed through, and boils, the second chamber, and its vapor boils the first in turn, while *its* vapor is carried to the doubler and boils that, and the vapor from that is carried into a condenser ("the worm"), from which the wines are drawn into their cisterns. The first and last of each charge, are "low-wines,"—the middle of the charge, only, being higher proof. And the beer-runner is required to turn the low wines back into the doubler, and discharge the middle of the charge into the Government cisterns.

Much experience is needed in a beer runner, for many causes; and on his action will depend, to a large extent, whether the wines in the Government cisterns are below or above proof; and even the most experienced make the same blunders with greener men, if inattention from sickness, preoccupation, company or other cause shall, even for a moment, cause neglect of duty.

As experienced men become such only through practice, and are scarce, beginners must be put to the responsible post, or men, representing themselves experienced, yet lacking its lessons, must be tried.

We have now reached the end of our distillation, and the product is the separated distilled spirits of the statute, ranging anywhere from 25 to 80 per cent. alcohol.

If 50 per cent. is alcohol, it is called "proof spirits."—This name arose from the old way of testing alcoholic liquors by igniting a little, in connection with gunpowder; if the powder was fired, the spirit was considered strong, and called proof; if it contained more than half water, the powder would not ignite, and the liquor was called "below proof." Since the specific gravity has given a more perfect test, this pro of is fixed at 100 on the meters, absolute alchohol at 200 proof, or "100 over proof," 90 per cent. alchohol at 180 proof, or 80 over proof, and so on, down through highwines, and low-wines, to one half of one per cent alchohol, which would be one proof or 99 below proof. And if the Statute will go below that, to find alchohol to tax, it must find commerce a new meter.

Yeast.

This is a very interesting subject, to a distiller, upon which his whole success depends; yet, it is a secret in a very few hands.

All "mash men" know at least, how to guess when the last yeast is ready to put in a mash. Back of this, however, are various steps in practical knowledge, acquired only by careful observation, labor and the teachings of others.

This last yeast is a tub of 100 to 200 gallons of fermenting meal, made from malt.

We will commence back at the fountain, or highest grade of this Masonry: Joseph Wright, of Utica, N. Y., and perhaps a dozen other bright lights, stand on the pinacles of profit; and many others, behind them, make the first yeast.

Of what they make it, is their secret. It is concocted so as to preserve all their sources of profit in it, to themselves. Every ingredient is prepared with the greatest care; and, then, they are combined at certain times and temperatures, known only to the initiated. From the time the combination commences, till the process is well under way, the owner hardly leaves it an hour; after a while he ventures to sleep in an adjoining room, and finally, after, from 4 days to the 10th or 12th, the result is secured, the yeast is bottled in quart bottles or less, or reduced to small solid cakes, or to whatever peculiar form it is adapted. Until this hour, a thunder storm or any other untoward circumstance, however slight, will destroy the work, and compel a new beginning. And after this it must be kept at just such a temperature, completely free from air &c.; the slightest taint must be detected and avoided, or thousands of dollars will be lost by imperfect work.

The next step applies one bottle, or a little cake, to 10 or 20 gallons of material which has been very carefully prepared, and is fermented at fixed temperatures with watchful care. After some days this is put into half gallon jugs, carefully corked, and kept carefully at certain fixed temperatures.

A jug of this is applied to certain larger quantities; and,

finally, after eight or ten successive fermentations, a number of 200 gallon tubs have been fermented, one of which the mash-man applies to the 10,000 gallon mash, and, thus, finally, probably less than ten drops of the original yeast ferments 10,000 gallons, in which are the husks, bran and meal of 250 bushels of grain.

Chemical production from impure materials, is ever varying; and, whichever cause predominates, will make this mash an alcoholic solution, a sour swill or a corrupt and putrefying mass; or will stay all decomposition and hold it, an almost inert infusion of meal.

Some have boasted that one bottle of their yeast would ferment 1,000 bushels a day, for a year, and produce a pint more wines to the bushel than any other yeast, with which it came in competition.

In the Supreme Court of the United States.

LEMUEL W. MASON, *Appellant*, *vs.* E. A. ROLLINS, Commissioner of Internal Revenue, W. B. ALLEN, Collector, and DUNCAN FERGUSON, Assessor, *Appellees.*	No. 273.
PARKER R. MASON, *Appellant*, *vs.* C. DELANO, Commissioner of Internal Revenue, W. B. ALLEN, Collector, DUNCAN FERGUSON, Assessor, and S. S. MANN, Deputy Collector, *Appellees.*	No. 274.
PARKER R. MASON, *Appellant*, *vs.* C. DELANO, Commissioner of Internal Revenue, EDWARD JUSSEN, Collector, J. D. WEBSTER, Assessor, and P. W. HART, Deputy Collector.	275

Clause of Constitution violated.

SECTION XCVII.

The Revenue Act of July 20, 1868.

Sec. 1. There shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid, a tax of fifty cents on each and every proof gallon, to be paid by the distiller, owner, or person having possession thereof before removal from distillery warehouse; and the tax on such spirits shall be collected on the whole number of gauge or wine gallons when below proof, and shall be increased in proportion for any greater strength than the strength of proof spirit as defined by this act; and any fractional part of a gallon in excess of the number of gallons in a cask or package shall be taxed as a gallon. Every proprietor or possessor of a still, distillery, or distilling apparatus, and every person in any manner interested in the use of any such still, distillery, or distilling aparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, and on the lot or tract of land whereon the said distillery is situated, together with any building thereon, from the time said spirits are distilled until the said tax shall be paid.

Art. 1, S. 2. 3.
Art. 1, S. 9. 4.
Art. 1, S. 8. 1.
Art. 1, S. 8. 18.
Amendments 4. 5. 10.

(1.) The tax of 50 cents per gallon, as laid by this Section, is not uniform.

It is an excise upon an article produced within the Country, viz: distilled spirits, and is apportioned thereon by three diverse rules, viz:

1st. 50 cents on every "proof gallon," of "proof" or "over proof;" that is, on every half gallon of pure distilled spirits, produced in connection with its bulk, or less than its bulk of water, without reference to the number of measured gallons of the materials produced.

2d. 50 cents on every measured gallon of the material produced, when below proof, without reference to the amount of distilled spirits contained therein.

3d. 50 cents on every fraction of a gallon, in excess of the number of even gallons found in a cask, without reference either to the measure of such fraction, or the amount of distilled spirits contained therein.

It will be observed that the tax is levied on "all distilled spirits," and that the second clause of the sentence charges it upon "such spirits" in such a manner as to place it beyond the possibility of a doubt, that *distilled spirits* is the one and only substance, which is taxed by this Section.

Section 4 affords absolute confirmation of this position, in its enactment; that "distilled spirits, spirits, alcohol, "and alcoholic spirits, within the true intent and mean- "ing of this Act, *is the substance*, known as Ethyl, Alco- "hol, hydrated oxide of Ethyl, or spirits of wine, "which is commonly produced by the fermentation of "grain, starch, molasses or sugar, including *all* dilutions "and mixtures *of this substance;* and the tax shall at- "tach to this substance as soon *as it is in existence as such*, "whether it be subsequently separated as pure or impure

"spirit; or be, immediately or at any subsequent time, "transferred into any other substance, either in the pro- "cess of original production, or by any subsequent pro- "cess."

The language used is unscientific: the words, "distilled spirits," are used to describe undistilled alcohol in solution; "transferred" is used for transformed, transmuted or converted; but, the intent is made obvious, i. e., to lay the tax on *the substance*, and to permit no evasion of the fullest operation of that intent.

Alcohol, then, is the substance;—the tax attaches as soon as it exists,—shall be paid by the distiller or owner, before removal from the distillery warehouse,—shall be 50 cents per half gallon of alcohol, on proof, or above proof, —shall be 50 cents per gallon on the measured gallon of fermented material, in which the process shall be continued right on, without distillation, and its alcohol converted into vinegar, or into any other article. (NOTE.—This is particularly referred to in the latter half of Sec. 4), and on every other low proof production;—thereby falling on the alcohol, converted into vinegar, at a rate 25 times as great as on that in proof spirits, and varying, according to the strength of the spirits, from that proportion to the minimum of proof spirits, which minimum tax is laid on all spirits above proof, except fractions of gallons in packages.

The only semblance of uniformity is found in the fact that the Act is applicable throughout the United States, and every distiller pays according to the same rule.

That it falls *uniformly*, is an assumption, not borne out by any construction of the Act: If all producers produced the same proof, uniformly, the tax would have been

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uniformly laid on wine, or measured gallons; as they do not, it was necessary, for uniformity, to reduce all to proof, and tax uniformly every half gallon of alcohol.

If any distillers produce, *regularly*, spirits which are below proof, they pay a higher tax, than those who regularly produce high proofs.

If none produce, regularly, spirits which are below proof, then, of necessity, the amounts produced must be irregular, subject to no fixed rule, and, with a higher tax than on higher proofs, must be (as in fact they are,) the result of accident, and uniformity of accidents becomes necessary to uniformity of burden:—

And, as to the fractions, equality or uniformity, between any *two* distillers, even, must be the result of the purest accident.

This forced uniformity is urged by no one, however, except those who claim that Congress can force the construction of the Constitution, and, by the subterfuge of arbitrary assumptions, can evade its provisions and defy its effect.

But the argument fails from another cause: If this is a direct tax upon distillers, it is not an excise, laid upon property or the profits of business. If it is a direct tax, it should have been laid in proportion to the census. It is not so laid, but is laid upon property, and only reaches the distiller through the accident of his ownership. If it is laid upon property, and has no real relation to its owner, then the rule of uniformity must relate to property, and the excision must be uniform from every half gallon of alcohol.

That this is the manner in which it is laid, appears in *Dobbins* v. *Comrs. of Erie County*, (cited ante).

That it is, in this Section, laid upon property without any reference to persons, appears also by Sec. 4, in the clause which declares that the tax shall attach to this substance as soon as it exists, whether separated as pure or impure spirits, or converted without separation (either in the original process which produced it, or any other) into vinegar or any other substance; and by Sec. 1, which lays it *in terms* on the spirits, and proceeds "to be paid by "the distiller, owner or possessor"—no duty being particularly imposed on any one.

This also develops another point of manifest departure from uniformity. If a vinegar manufacturer makes low proof spirits, and in the same process, converts them into vinegar, the excise from his alcohol is many fold greater than that on proof spirits, separated and afterwards diluted, and converted into vinegar by a distinct process. All know that proof spirits will not sour; therefore, the material, in which the alcohol is produced which is afterwards by the same process converted into vinegar, must be far below proof; and thus, as to vinegar manufacturers, this excise cannot be uniform.

The bill of complaint was not framed with special reference to this lack of uniformity, because, it did not occur to my mind until after the argument of the motion for a preliminary injunction; but though somewhat inartificial, I conceive that the general allegations, the "offer to do equity," viz: to pay all taxes and excises, which are or may become due from him, in good faith, as soon as the same are levied or in any manner become due; the necessary answer to the first interrogatory, and the prayer for

injunction against defendants, forbidding them to carry the statute into effect, or to execute it, except to collect and receive the taxes therein justly laid, and, the prayer for general relief,—were sufficient to have entitled the plaintiff to answer, and to relief.

(2.) The next clause makes *every* proprietor, or possessor of a still or distillery, *and* every person interested in the use, jointly and severally liable for the taxes imposed on the distilled spirits, produced therefrom.

Every proprietor, *i. e.*, owner:—complete ownership of property of this kind, may be in many: one is a tenant in common,—another has an estate for years carved out of it,—another the reversion, another a trust estate, another the legal title, and another the right of possession,—all are owners; one may be the real proprietor, and the other in possession, under what he believes to be, good title,—and the word *every* covers all these. Again: a tenant is in possession, but his possession is the possession of his landlord,—the word "*every*" covers both. Had the word "*the*" been used, "*or*" would have been a disjunctive, and the liability would have been confined to the person using the land, &c., but, the person using, is designated, and *every* proprietor, *or*, what is synonymous, possessor of a present estate or interest in the land; and thus —all are made liable for the taxes, imposed by law on distilled spirits produced therefrom.

In this plaintiff's case, not only *he* is liable, but also his lessor. And if the statute is valid, the lessor can, in equity, prevent his use of the land for a purpose that would entail a liability, he never contracted to bear.

(3.) Further: the tax is made a lien, both on the property of the person under obligation to pay it, and on that

of others, who are under no obligation to pay, and who have no power, whatever, to enforce its payment.

Unless this portion of the section is necessary and proper to carry the taxation into execution, it has no Constitutional authority and is void.

Its bare statement shows it to be unreasonable, unnecessary, improper and tyrannous: The tax is laid upon the half gallon of alcohol; and the levy can only be carried into execution by taking the part which the government hath therein, or compelling some person, who has the power, to separate that portion from the balance,—as to every other person, it is an arbitrary imposition, without right.

As to the lien, on the property of persons who are strangers to the duty, and have no power to compel its execution, it is clearly without the sanction. If they should pay the amount,—they would *not* pay *the tax:*—would not separate the States' portion from the balance of the article taxed, but would separate an arbitrary imposition from other property, which was not taxed.

(4.) Again as to the distiller's own property: A lien is a right in property, to secure the payment of a debt, or performance of a duty.

Where it accrues, it is, to that extent, a divestiture of the estate of the owner. Where this taking in pledge is involuntary on the part of the pledgor, it is a seizure by the pledgee.

The entire distillery, with its lot, buildings, tools and appurtenances, together with the spirits, are so out of all proportion to the debt or duty, for which also the body of the person owing the tax is pledged,—that it is unreasonable.

It is unreasonable to take all a man has, *and more*, and tie his business up, to secure fifty cents that he is ready to pay; and this statute, being an unreasonable seizure,—is void. (Amendments, Art. 4.)

The whole section, and with it nearly the entire act, are void, because contravening the Constitution in the provisions found in

Art. 1 Sec. 2, 3; Sec. 8, 1; Sec. 9, 4.

[NOTE:—As it is desirable to point out the particular clauses of the Constitution violated, I will at the end of the comments on each section enclose in brackets a memorandum of the sections to which we appeal: asking that in application, those rules which we cannot reiterate for want of space may be remembered, and especially, that, most important in construing and applying Constitutions: that "a thing within the spirit and meaning of the act is "as much within it as though within the letter."]

(The section violates Art. 1 S. 2, 3; S. 8, 1; S. 9, 4; S. 8, 18, and Amendments 4, 5 and 10.)

SEC. 2. *And be it further enacted*, That proof spirit shall be held and taken to be that alcoholic liquor which contains one-half its volume of alcohol of a specific gravity of seven thousand nine hundred and thirty-nine ten-thousandths (.7939) at sixty degrees Fahrenheit; and the Commissioner of Internal Revenue, for the prevention and detection of frauds by distillers of spirits, is hereby authorized to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments, meters, or other means for ascertaining the quantity, gravity, and producing capacity of any mash, wort, or beer used or to

art. 1, S. 1.

art. 1, S. 8. 18. Amendmts 5. 10

be used in the production of distilled spirits, and the strength and quantity of spirits subject to tax, as he may deem necessary; and he may prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking, and gauging of spirits. And in all sales of spirits hereafter made, a gallon shall be taken to be a gallon of proof spirit, according to the foregoing standard set forth and declared for the inspection and gauging of spirits throughout the United States. The tax on brandy made from grapes shall be the same and no higher than that upon other distilled spirits; and the Commissioner of Internal Revenue is hereby authorized, with the approval of the Secretary of the Treasury, to exempt distillers of brandy from apples, peaches, or grapes exclusively, from such other of the provisions of this act relating to the manufacture of spirits as in his judgment may seem expedient.

art. 1, S. 8. 5.

art. 1, S. 1.

Sec. 2 is bad, in this, that it authorizes the Commissioner, for the prevention and detection of frauds, to prescribe meters of a dozen sorts, measures, weights, rules and regulations, and to except such distillers of brandy, from such provisions of the Act, as he may deem expedient;—that is:

1st. Frauds will prevent "carrying into effect" the collection of this excise. Congress has power to pass all laws, necessary to carry the tax levy into effect; but, Congress delegates, to the Commissioner, power to make "rules of action," otherwise called: laws,—to prevent such frauds. This might be admissible if these prescriptions were authorized as mere executive acts for the organization of

subordinate executive officers, *for whom this officer was responsible*, and were not intended to govern the action of any other persons; but, subsequent sections show, that the delegation of power passes the line between the executive and legislative authorities, and authorizes the Commissioner to prescribe rules of action, not only for his subordinates, but also for the body of the people.

2nd. The Statute, as passed, covered distillers of brandy:—the Commissioner may repeal it as to them, in whole or in part. I have yet to learn that repeal is any less than legislation; and can find no authority for Congress to delegate the legislative powers, vested in it, to another. On the contrary, it is decided, in *C. W. & Z. R. R. Co.* v. *Coners*, 1 *Ohio State Rep.* 77, *p.* 87, that the legislature cannot surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body.

And in *Toledo Bank* v. *Bond*, 1 *Ohio State Rep.* 622, *pp.* 667 *and* 8, the Court, defining these powers, holds that the legislative authority includes the control over existing statutes, by amendment and repeal.

In *Wayman* v. *Southard* this Court said:

"It will not be contended that Congress can delegate to any other tribunal, powers which are strictly and exclusively legislative.

(*Wayman* v. *Southard*, 10 Wheat. 5, 42).

The doctrine of the note to Hayburn's Case, 2 Dall. covers this ground also, viz: All legislative powers of the United States were not granted to Congress; on the contrary, a large share was exercised by the people in enacting the Constitution, and was by them expresssly reserved to themselves.

The people delegated to Congress certain authority, and

reserved *the power to delegate*, to themselves. In the power of attorney to Congress, no power of substitution is found,—the trust is strictly personal.

3rd. The Commissioner "may prescribe rules and regu-" lations to secure a uniform and correct system of inspec-" tion, weighing, marking and guaging of spirits." "And " in all sales of spirits, hereafter made, a gallon shall be " taken to be a gallon of proof spirit, according to the " foregoing standard, set forth and declared for the in-" spection and guaging of spirits throughout the United " States."

"STANDARD"—That word was found in the Constitution, and transplanted thence into a strange soil.

Weight and measure, are abstract and universal; their standard must be alike abstract.

Weight, is the measure of the force of gravity; the quantity of a body in the balance.

Measure, is that, by which extent or dimension is ascertained.

The brass Troy Pound, kept in the mint, is a standard of weight; a gallon measure, so kept, might likewise be a standard of measure, or, a fixed number of cubic inches would designate the standard gallon.

At the date of the Constitution, a yard stick, kept in the Tower at London, a brass pound, and a gallon measure, had long been fixed as the standard of weights and measures in England.

But this Act betrays itself; for, it assumes the standard of an abstract gallon measure, to have been fixed;—nothing in it is done by virtue of the power to "fix the standard of weights and measures."

That the right of *Inspection* belongs to the States, ap-

pears *first* by the Constitution, Art. 1, S. 10 (2): Though imports and exports, and Commerce between the States and with foreign nations, are taken entirely away from the States, they may tax imports and exports, enough to pay for executing their inspection laws.

Inspection of bread, to ascertain whether full weight, and wholesome; provisions in casks, flour in barrels, for the same purpose; drugs, medicines, chemicals, spirits,—to see that the article is what it purports to be, and that the citizen is not defrauded in its purchase. This power ranges itself under the power of internal regulation of the States, or police power; and as State governments were instituted precisely for that purpose, it belongs to them.

A State may prescribe that, in every sale of alcohol, a gallon shall be held to mean a measured gallon, containing 90 per cent of spirit, and in all sales of spirits, when the strength thereof is not limited by the terms, the word spirits shall be held to mean, alcoholic liquor, containing 75 per cent of alcohol; all whiskey, sold for consumption, shall contain, at least 40 per cent of spirits, and so on.

The matter of application of the *standards* to *specific articles*, is, and, from the complicated local causes and utterly diverse necessities of the several States, must always remain, in their regulations; and they—as far as these applications partake of the nature of police regulations—will secure their enforcement by their inspection laws. A glance makes it apparent, that it cannot be a concurrent power in Congress and in the States; for, two applications of the same standard, to the same article, would furnish two rules, one of which only could be followed.

Lord Coke evidently understood the standard to be abstract, and in Magna Charta it appears to be so regarded, while the same Chapter, having jurisdiction over that, also

applies the standard to specific articles. *Chap.* 25 (2 Co. Inst., 41) is, as follows: "One measure of wine shall be "through our realm, and one measure of Ale and one "measure of Corn, that is to say, *the quarter of London:* "And one breadth of dyed Cloth, russets and haberjects, "that is to say two yards within the lists. And it shall "be of weights as it is of measures."

On which Lord COKE says: "This act concerning mea- "sures and weights *that their should be one measure and* "*one weight through England* is grounded upon the law of "God." And it appears also that this was the law long prior to this time. *Leges Will. Regis Conq. & Leges Canuti, Cap.* 9.

Art. 1. S. 1.—S. 8, 18. Amendments 5 and 10.

SEC. 3. *And be it further enacted*, That whenever the Commissioner of the Internal Revenue shall adopt and prescribe for use any meter, meters, or meter safes, it shall be the duty of every owner, agent, or superintendent of a distillery to furnish and attach, at his own expense, such meter, meters, or meter safes as may have been prescribed for use at his distillery, and to furnish all the pipes, materials, labor, and facilities necessary to complete such attachment in accordance with the regulations of the Commissioner of Internal Revenue, who is hereby further authorized to order and require such changes of or additions to distilling apparatus, connecting pipes, pumps, or cisterns, or any machinery connected with or used in or on the distillery premises, or may require to be put on any of the stills, tubs, cisterns, pipes, or other vessels, such fastenings, locks, or seals as he may deem necessary.

Art. 1, S. 1.
Art. 1, S. 8. 18.
Amendm^ts 5. 10.
Preamble

Sec. 3 is bad, in that it gives the Commissioner powers, utterly unwarranted:

1st. To legislate, as in the 2d Section.

2nd. To order, or command a citizen, to add to, or alter his property, and obey his will.

Now, every law imposing a duty, implies a penal sanction; and if the owner of the property disobeys this ruler, who is set over him, he is liable for a misdemeanor.

Dwarris, pp. 518, 519, 536, 537.

A Statute, giving a penalty, implies also a prohibition of the act rendered penal.

Hallett v. *Novion*, 14 Johns., 273, p. 290.

Mitchell v. *Smith*, 1 Binney, 110.

Bartlett v. *Vinor*, Carthew, 252.

The Commissioner has prescribed meters, and required all distillers to pay for them and attach them to their distilleries, at an expense, often, of thousands of dollars.

The Statute authorizes the Commissioner to prescribe, severally, for each distillery. Therefore, this cannot be justified as a tax on the distillers, or an excise or impost on their property or business; for, *Congress must* lay all direct taxes in proportion to the census; and all excises and imposts must be imposed by an uniform and unvarying *rule.*

The discretion of the Commissioner, is not an unvarying rule; and the language of the Section shows, that it was not intended to be uniform.

Again: Taxes are taken for the support of Government; —the price of these meters, and cost of these alterations, does not support the Government, or even enter its treasury.

Again: Congress cannot delegate the power of taxation; —therefore, this cannot, in any sense, be a tax.

In some of the States, where equality of taxation is a requisite of Constitutional enactment, special assessments for public improvements are justified under the right of eminent domain. Thus, the special assessment is, a taking (excision) of a certain amount of money from a mans property, for public use, for which full compensation is paid to the citizen, by the return of benefits of equal, or greater value to the same land. *Chicago* v. *Larned*, 34 Ill. 203.

But this case cannot be justified under eminent domain; for, the money is taken for his private use, and not that of the public. The meters and changes are not a benefit, or of value to the citizen,—he may have meters that suit him, or may prefer a quart cup to measure with,—they are solely for the benefit of the Government; and thus Government attempts, not only to compel a citizen to acquire private property that he does not want, but also to furnish that private property, for public use, without compensation.

The expense of these meters and changes is not taken as a debt, nor as a penalty for crime; for, no debt has been incurred or crime committed. And, we come upon the broader ground, that Congress is so far from authority to delegate such powers to the Commissioner, that it has no authority itself, to make such a regulation.

It is part of the public liberty of every man, to use his own time and capital, as he pleases; and, if Congress will tax his capital, and *excise a portion of it*, it must take it, as it finds it,—it must cut its portion from—what is.

Lord Coke defines Tallagium as including all taxes, and as obtaining when the King hath a share in any man's goods, estate or profits. And the Supreme Court, in *Gibbons* v. *Ogden* and in *Dobbins* v. *The Comrs. of Erie*

County, (*cited, ante*), have adopted the same rule after two centuries.

Because Governments can preserve this public liberty to acquire, possess and enjoy property, and the property itself, they may cut a portion from that property for their support; but they cannot destroy the liberty, which is the consideration of their right to excise a portion, and still continue the excise as of right.

The practical working of this section has been such, that adjectives are inadequate to characterize.

1st. The Government becomes a brokerage. The Commissioner prescribed Tice's meters, and required each distiller to deposit the money, about $1000 to $3000 each, with the Government, for Tice's benefit, as a condition precedent, to the use of their distilleries.

2d. This condition precedent being complied with, the distilleries were allowed to run, *though the meters were not supplied for nearly a year.*

3d. About one year later (in June, 1870,) the Commissioner ordered all these meters to be taken out, and another kind to be placed at the expense of the distillers, within 90 days.

Preamble.—Art. 1., s. 1.—S. 8, 18.—Amendments, 5 & 10.

Sec. 4. The following forms part of the Bill, having been promulgated to the Revenue Officers throughout the country:

Instructions to suppress the unauthorized production of alcoholic spirits and vapors.

TREASURY DEPARTMENT, Office of Internal Revenue,
Washington, July 25, 1868.

The provisions of section four of the Act of July 20, 1868, are as follows:

Sec. 4. *And be it further enacted*, That distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act is that substance known at ethyl, alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentaion of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process; and no mash, wort, or wash fit for distilation or the production of spirits or alcohol shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person other than an authorized distiller shall by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol or any vapor of alcoholic spirits in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid. Any person who shall violate any of the provisions of this section shall be fined, for every offense, not less than five hundred dollars, nor more than five thousand dollars, and imprisoned for not

amendmt 10. 5. 7.

Art. 1, S. 8. 18.

amendmt 8.

less than six months nor more than two years: *Provided*, That nothing in this section shall be construed to apply to fermented liquors.

The object of this section was evidently to enable the Internal Revenue Office to suppress all manner of distillation of spirits not expressly authorized by law, and to collect the tax on all alcoholic spirits manufactured. The laws existing prior to this act were found to be inefficient, and all efforts to secure a uniform enforcement of them, were frustrated by a disagreement among the courts in different sections of the country as to the proper construction of such laws. The meaning of this section, however, cannot be a matter of doubt. Under it, no article into which alcoholic spirits or alcoholic vapors enter as an ingredient can be lawfully manufactured, except such spirits or alcohol have been produced in an authorized distillery and have paid the tax.

The largest class of cases affected by this section is that of the manufacturers of vinegar by various processes of distillation. Many of these manufacturers have been honestly engaged in the business of making vinegar with no intention to defraud the revenue; while many others, under the pretence of making vinegar alone, have been committing flagrant and intentional frauds. Between these two classes Congress has made no discrimination, and the provisions of this section were intended to close all such manufactories.

In order that equal and uniform justice may be done to all persons engaged in this business, assessors and collectors will at once take steps to advise those in their respective districts of the terms of the law, and the purpose of the department to require full compliance with its provisions; and if any one carries on, or attemps to carry

on, the business prohibited by this section, after being so advised, they will institute proceedings under its penal provisions.

E. A. ROLLINS, *Commissioner.*

With these instructions, contained in full in the Bill, and the allegation that the other defendants threatened, and intended, to execute them, and that, by reason of the Act, the instructions and threats of the defendants, the complainant could not use his property, and was being damaged thousands of dollars annually,—the Court below held, that he had alleged nothing to have been done by these officers.

The private opinion of counsel is, that it is a vastly stronger case than, *Osborn* v. *U. S. Bank*, (9 Wheaton).

The position of the defendant Rollins, who controls all the rest of the defendants, was here taken by him; and his construction was commanded to be enforced by Allen & Ferguson; and, after Rollins, the other defendant, Delano, his successor, endorsed, and has continued the *law*, promulgated as above, to this day.

(1.) Mr. Rollins assumes, in an *ex cathedra* style, that there is distillation of spirits, and production of alcoholic spirits and vapors, not expressly authorized by law; and that the object of this section was evidently to enable HIS OFFICE to suppress all such.

The word *law*, it will be observed, is used by him, here and everywhere in his regulations which are before the Court, as synonomous with *statute.*

Then, these things are authorized by the Legislature

only; and unless expressly so authorized, *his office* is enabled and will suppress them. By what authority these very things were done, before the legislative favor granted the dispensation, does not appear.

The question is not new in this court. The License Tax Cases, 5 Wallace, p. 470 et seq. have recorded the judgment.

And the fundamental doctrine—that all men, of right, may acquire, possess and enjoy property; enjoy it as they will, and to produce and acquire other property,—overthrows the dictum of *his office*, and not only destroys the assumption that the legislature has *authorized* any legitimate business, or means of livelihood, but, showing that it is part of the common liberty of every man, the inalienable birthright, shows also, that *Congress* cannot suppress such business, except by wrong—much less, *his office.*

(2.) The censor tells us why the suppression of "all manner" of things, not expressly authorized by Statute, was withdrawn from the Courts, and committed to *his office*:—because all efforts to secure a uniform enforcement of the Statute were frustrated by the Courts.

(3.) Many vinegar manufacturers have honestly done business, without a taint of fraud; others have committed flagrant and intentional frauds.—Between the two classes Congress has made no discrimination, but intended to destroy all alike.

It was necessary to take this from the Courts: *They* never would have sanctioned such atrocities.

(4.) If any one carries on, or attempts to carry on, the business, prohibited by this Section (as *this office* understands it), Assessors and Collectors are commanded to institute proceedings under its penal provisions.

Other instructions require them to seize and proceed for forfeiture *in rem.*

Those instructions and commands, which have and do move the defendants, Allen and Ferguson,—Collector and Assessor,—to dismantle and injure plaintiff's property, so that it cannot be used, and under which they forbid and prevent its use, are secret;—this open, public manifesto shows the animus of *this office*, and that the secret commands, under which the plaintiff suffers, are as severe,—and their execution will suppress his rights, *unless the Courts resume jurisdiction.*

This Manifesto bears the appearance of the testimony of a lawyer of Illinois ("a very smart man," if his judgment was not at fault), who was called as a witness, to prove certain facts arising under a new Statute. The questions propounded were general, and the witness, evidently well instructed, proceeded, from the fact, to construe the Statute. The Court cut him short, with the severe question: "What have you to do with the construction of this Statute, Sir?" The witness, nothing abashed, evidently thought the Court supposed he could not lay a foundation for his testimony, as an expert, on the subject, and calmly and triumphantly proceeded: "I ought to know what that law is intended to command. I drew it myself, and got it passed."

A singular combination of powers appears to be vested in this officer; for, his office is primarily executive; we have seen that he is authorized to make laws, thus adding the legislative functions; and now find that he may construe and declare what are the laws, and cause the law, as declared by him, to be executed,—thus uniting the complete judicial functions with the other departments of government, in a single autocrat.

We leave the Commissioner, and return to the Statute.

(1.) Sec. 4 forbids the use of spirits, manufactured at home or abroad, and owned prior to the passage of this Act,—for any purpose of manufacture, whatever, because, not manufactured in an authorized distillery. (A dealer in varnish, with a year's stock of alcohol for its manufacture, would have to buy new, of authorized distillers.) This cannot be the law,—the Statute to the contrary, notwithstanding.

Wynehammer v. *The People*, 3 Kern, 378.

(2.) Its penalties are cruel, and the fine excessive: A man who would manufacture a gallon in a tea pot,—thereby owing the Government 50 cents; or—the inventor, who would improve the process of distillation, sets up a model in his machine shop, over a gas burner, and produces a quart of alcohol a day,—must be fined not less than $500, and imprisoned not less than six months.

This cannot be answered with the maxim: "*De minimis non curat lex*;"—the law does care for a dollar, and makes it larceny to steal one, and gives an action for the recovery as a debt.

(Amendments, 5, 9 and 8; Art. 1, S. 8, 18.)

This section, again, entrenches on the common right of every man to use his capital as he choses:

Because knitting factories have been licensed, the Government could forbid women to knit stockings by their own firesides, as justly and with as much authority, as to make the prohibitions of this section.—And so we might go through the whole list of rights to use property.

July 8, 1870. As this goes to press, I am obliged to qualify the above remark, and say: The Courts never would, *uniformly*, have sanctioned such atrocities.

The morning papers contain an opinion delivered yesterday, and entitled UNITED STATES DISTRICT COURT. *The United States* v. *Charles G. E. Prussing and Louis Hitz.* INDICTMENT. From the *opinion*, it appears that the case was by agreement submitted to the Court for trial, and the Court finds that defendant Prussing had, for many years, been a manufacturer of vinegar, by fermenting grain with yeast according to the process described in the former section of this argument, distilling the product, and, instead of using the distiller's condenser ("worm") had passed the vapors into water, which, when duly charged, was passed through the generators, where it oxydized and became vinegar. At the date of the passage of the statute Prussing was in Europe, and wrote his superintendent to use molasses and water, and a slower process of fermentation and oxydization without distilling. Hitz, the superintendent, took the advice of a chemist, under which he adopted a sour ferment, in the place of yeast, by which the product was so rapidly changed into acetic acid, as to be practically unfit for distillation into alcoholic spirits; and continued the use of grain. The Court closes: "I there-
" fore conclude, after careful study of the law, that *it was the*
" *intent of Congress to prohibit absolutely*, the fermentation
" of any compound whereby alcohol should be evolved
" unless the same was done in an *authorized* distillery.
" Taking this view of the law, I am obliged to find the
" defendants guilty."

On a superficial view, it would appear that we had our remedy at law for all such proceedings, by interposing the defences at the trial:—but this case carries us beyond the surface.

The Commissioner directs all the officers, detectives and

special agents, numbering many hundreds, to seize,—as well as institute proceedings under the penal provisions.

But upon the penal provisions we have no remedy, for if the officer institutes the proceedings under the order of his superior, it seems *he* is not liable for exemplary or consequential damages caused by the trial, penalty and imprisonment. Yet if he does institute the proceedings it seems the Courts will grant the indictments,—precisely as they would do, if the institution was caused by the most malicious motives,—and not only indict but convict, and, —of course, sentence.

Sentenced and imprisoned, what is the remedy?

I have long been of opinion that, under the present laws a prisoner might, as in the Yerger case, obtain a hearing in the Supreme Court, upon the single question,—"is he "confined without law, the statute and indictment thereon "being void?" but the question is, at best, a doubtful one, and the remedy distant, and subject to be excepted from the appellate power at any moment, by act of Congress.

The statute—and the *prima facie* duties of these officers —and the accelerating orders of the Commissioner,—all, constitute a continually impending danger; which so harasses the party as by its duress to prevent the exercise of almost any right not absolutely necessary to his existence.

The spirit and intent of the consitution was to insure tranquillity in the exercise of these absolute rights to complete ownership in and enjoyment of property. And the instance is one of remarkable application of the rule. Removal of such duress is as essential to the free exercise of the blessings of life in tranquility, as it is essential to liberty that a person imprisoned by color of legal process be released on *habeas corpus* from illegal duress; and being

clearly within the intent of the constitution—though the wrong be a new one, it is, not the less, one for which the constitution has commanded a remedy.

SEC. 5. *And be it further enacted*, That every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the assistant assessor of the division in which said still or distilling apparatus shall be, by filing with him duplicate statements, in writing, subscribed by such person, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the assistant assessor and the other transmitted to the assessor of the district. Stills and distilling apparatus now set up shall be so registered within sixty days from the time this act takes effect, and those hereafter set up shall be so registered immediately upon their being set up. Any still or distilling apparatus not so registered, together with all personal property in the possession, or custody, or under the control of such person and found in the building, or in any yard or inclosure connected with the building, in which the same shall be set up, shall be forfeited. And any person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of five hundred dollars, and on conviction shall be fined not less than one hundred dollars nor more

Amendmts 4. 5. 6. 8. 10.

Art. 1, S. 8. 18.

Amendmt 8.

than one thousand dollars, and imprisoned for not less than one month nor more than two years.

Sec. 5 is bad, in this, that its penalty is cruel and excessive: Sickness, coverture, infancy, ignorance, or even the very slight value of the worn out distillery apparatus, affords no palliation;—an inexorable and cruel imprisonment, like a felon, must follow.

And as to forfeiture: because Congress may levy an excise on certain property (in this case, a license tax), does it follow that it may take away other property on which it levies no tax?

It takes the property of the citizen, *only* under its power to tax; it does not tax; yet, takes the property!

Again: A small and nearly worn out Still, is set up in a barn; in the barn yard, under the control of its owner, are 1000 cattle, under his control, but owned by others. His still is not taxed; he owes the Government nothing; yet, under this power to levy the tax on other stills, his barn and contents and all the cattle in the enclosure are taken, divesting the owners.

(Amendments 4, 5, 6, & 8; Art. 1, S. 8, 18.)

Sec. 6. *And be it further enacted*, That every person engaged in, or intending to be engaged in, the business of a distiller or rectifier, shall give notice in writing, subscribed by him, to the assessor of the district within which such business is to be carried on, stating his name and place of residence, and if a company or firm, the name and

place of residence of each member thereof, the place where said business is to be carried on, and whether of distilling or rectifying. And if such business be carried on in a city, the residence and place of business shall be indicated by the name of the street and number of the building. In case of a distiller the notice shall also state the kind of stills, and the cubic contents thereof, the number and kind of boilers, the number of mash tubs and fermenting tubs, and the cubic contents of each tub, the number of receiving cisterns, and the cubic contents of each cistern, together with a particular description of the lot or tract of land on which the distillery is situated, with the size and description of the buildings thereon, and of what material constructed. The notice shall also state the number of hours in which the distiller will ferment each tub of mash or beer, the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, and the names and residence of every person interested or to be interested in the business, and that said distillery and the premises connected therewith are not within six hundred feet of any premises authorized to be used for rectifying or refining distilled spirits by any process. In case of a rectifier, the notice shall state the precise location of the premises where such business is to be carried on, the name and residence of every person interested or to be interested in the business, by what process the applicant intends to rectify, purify, or refine distilled spirits, the kind and cubic contents of any still used or to be used for such purpose, and the estimated quantity of spirits which can be rectified, purified, or refined every twenty-four hours in such establishment, and that said rectifying establishment is not within six hundred feet of the premises of any distillery registered for the distillation of spirits. In case of

Art. 1, S. 8. 18. amendmt 5. 9. do. do. do. do.

any change in the location, form, capacity, ownership, agency, superintendency, or in the persons interested in the business of such distillery or rectifying establishment, or in the time of fermenting the mash or beer, notice thereof, in writing, shall be given to the said assessor or to the assistant assessor of the division within twenty-four hours of said change. And any assistant assessor receiving such notice shall immediately transmit the same to the assessor of the district. Every notice required by this section shall be in such form and shall contain such additional particulars as the Commissioner of Internal Revenue may from time to time prescribe. Any person failing or refusing to give such notice shall pay a penalty of one thousand dollars, and on conviction shall be fined not less than one hundred dollars nor more than two thousand dollars; and any person giving a false or fraudulent notice shall, on conviction, in addition to such penalty or fine, be imprisoned not less than six months nor more than two years.

do.

do.

amendmt 8.

Sec. 6 is objectionable in this:

1st. The process of fermentation varies, as much as 48 hours, with the weather and also with the chemical ingredients used; therefore, no good distiller can tell in advance how long he will ferment the mash.

2d. The time, necessary to ferment certain grains under certain conditions, so as to obtain the largest amount of spirits, is learned either by long experience, or the teaching of others; it is a trade secret; its knowledge is a means of livelihood,—no freeman can be compelled to publish it.

3rd. The details required, can only be enforced to such an extent, as to enable the Government to describe, with certainty, the distillery licensed; and I submit that an application for a license, stating the number or description of the lot, and the capacity of the Still and that it is the only Still on said lot,—is a sufficient description. Its peculiar construction is the invention of the owner; while he keeps its secret, no one else can take advantage of his skill; if he must publish its details, the world may obtain all the benefits of his experience, without compensation.

These inquisitorial requirements, and such added particulars as the Commissioner may prescribe, infringe the liberty of the citizen. If the Commissioner is strictly honest, no harm may ensue; if not, his powers may be prostituted to the basest uses.

An absolute monarch, of wisdom, integrity and charity, may govern to the best advantage of the subject.

We have chosen a republican form, because the one man power, or any power not emanating directly from the people, is dangerous; and have never delegated our authority to any one man, or set of men,—not our representatives, —be it King or Commissioner, Lords, Aristocrats, or revenue force.

The penal sanction of this Section is excessive for even utter failure of compliance, unless the intent is plainly proven to be fraudulent;—for failure in minor particulars, it is cruel. With the failure of the clauses requiring these minor matters, of course—the penalty fails also.

We will stop right here, at the threshold of these inquisitorial requirements, and endeavor to draw the line, beyond which they cannot go.

It need not be argued that, on criminal indictments, the

accused cannot by statute be compelled to furnish evidence to convict themselves; but a person, charged with a debt, or prosecuting a civil suit, may be compelled, by a bill of discovery, to state matters which will sustain the opposite case.

Suppose there were no penalties to this statute, and no crime in evading it! If the Government should file a Bill for discovery against a distiller, and insert the interrogatories: Before you commenced to run, how long did you intend to ferment each tub of mash, and how much did you estimate the establishment would produce in 24 hours?

How many bushels of grain have you bought? Of whom, and at what price? How many tons of coal? How many tons of ice? Of whom? &c., through all the requirements of this statute,—No Court would compel an answer, because, they would be so remote from the main point—viz: How much spirits, liable to tax, had been produced,—that, after they were answered, they would form no evidence, whatever, from which, even to deduce that main point.

Actual test might show, and would almost certainly show, that the mash might need fermentation hours longer or less than was contemplated,—that the capacity was greatly less or more than estimated.

The old distillers, whose little stills I have found steaming, by hundreds, on the western slope of the Alleghenys, —each in a little clearing and settlement in the rugged wilderness,—with a fire built right under them, in an arch of the size of an old fashioned wood stove,—produce from each bushel of rye, from 7 to 11 quarts, averaging among all of them, about 9 quarts of that smoky article, which years ago attained considerable fame as Monongahela whiskey.

Average distillers, with more improved establishments, produce about 14 quarts; and others, with secrets in the way of yeast, produce more; and some distillers pay men $1,000, $2,000, and even $3,000 a year, for making yeast; because, by it, they can produce enough more spirits from the same grain, to doubly pay it.

Tho coal and ice used, are still more remote; and the price paid for any article, has nothing to do with its productive power.

The whole use, then, of perfect answers to these questions, would be to furnish, not evidence, but only grounds for conjecture;—and all such matters are so remote, that answers to them, in chancery, would be impertinence.

Daniell's Chancery Practice, p. 731.

Wigram on Discovery, 72.

Janson v. *Solarte*, 3 Y. & C. Exch'r. R. 132, pp. 136 to 138.

Now, compelling a man to answer a question, to that extent deprives him of his liberty. If he is compelled to answer for no good purpose, he is deprived of liberty, without cause.

If he is compelled to answer to remote questions, which may furnish grounds, from which to conjecture his guilt —and, by statute, those conjectures are made evidences of guilt,—what is there to prevent any man from being required to divulge facts which, with the death of another, may furnish grounds of conjecture that he killed him, and then making such grounds evidence of murder.

Such enormities of legislation belong to the times of the Spanish inquisition.

Like Virgil's Judge of Hell, this law first punishes, then hears, and then compels to confess.

(Amendments 5, 8, 9; Art. 1, S. 8, 18; Art. 1, S. 1.

By a singular perversity, the commissioner has nullified the evident intent of the section, by requiring the assessor to command the distillers to ferment in 48 hours, and to assess the product upon that basis. And with as remarkable obliviousness to uniformity in taxation, he enacted this modifying statute for New York, months before he extended the enactment to Chicago; and I am informed that in some parts of the Union, to this day, his nullifying statute has had no promulgation. December 15, 1869.

Amendments 5. 10.

Art. 1, S. 1. — Art. 1, S. 8. 18.

SEC. 7. *And be it further enacted*, That every distiller shall, on filing his notice of intention to continue or commence business, with the assessor before proceeding with such business, after the passage of this act and on the first day of May of each succeeding year, make and execute a bond in form prescribed by the Commissioner of Internal Revenue, with at least two sureties, to be approved by the assessor of the district. The penal sum of said bond shall not be less than double the amount of tax on the spirits that can be distilled in his distillery during a period of fifteen days; but in no case shall such bond be for a less sum than five thousand dollars. The condition of the bond shall be that the principal shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, and will pay all penalties incurred or fines imposed on him for violation of any of the said provisions; that he will not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be encumbered by mortgage, judgment, or other lien, during the time in which he shall carry on said business. The assessor may refuse to approve said bond, when, in his judgment, the situation of the distillery is such as would

enable the distiller to defraud the United States; and in case of such refusal, the distiller may appeal to the Commissioner of Internal Revenue, whose decision in the matter shall be final. A new bond may be required in case of the death, insolvency, or removal of either of the sureties, and in any other contingency, at the discretion of the assessor or commissioner of Internal Revenue. Any person failing or refusing to give the bond hereinbefore required, or to renew the same, or giving any false, forged, or fraudulent bond, shall forfeit the distillery, distilling apparatus, and all real estate and premises connected therewith, and on conviction shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

— Art. 3, S. 1.

Amendm^ts 8. 9.

SEC. 8. *And be it further enacted*, That no bond of a distiller shall be approved unless he is the owner in fee, unencumbered by any mortgage, judgment, or other lien, of the lot or tract of land on which the distillery is situated, or unless he files with the assessor, in connection with his notice, the written consent of the owner of the fee, and of any mortgagee, judgment creditor, or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment, or other encumbrance, and that in case of the forfeiture of the distillery premises, or any part thereof, the title of the same shall vest in the United States, discharged from any such mortgage, judgment, or other encumbrance. In any

Amendm^ts 5. 10.

Art. 1, S. 8. 18.

case where the owner of a distillery or distilling apparatus, erected prior to the passage of this act, has an estate for a term of years only, in the lot or tract of land on which the distillery is situated, the lease or other evidence of title to which shall have been duly recorded prior to the passage of this act, the value of such lot or tract of land, together with the building and distilling apparatus, shall be appraised in the manner to be prescribed by the Commissioner of Internal Revenue; and the assessor is hereby authorized to accept, in lieu of the said written consent of the owner of the fee, the bond of said distiller with not less than two sureties, who shall be residents of the collection district or county, or an adjoining county in the same State in which the distillery is situated, and shall be the owners of unencumbered real estate in said district or county, or adjoining county, equal to such appraised value. The penal sum of said bond shall be equal to the appraised value of said lot or tract of land, together with the buildings and distilling apparatus, and such bond shall be conditioned that in case the distillery, distilling apparatus, or any part thereof, shall, by final judgment, be forfeited for the violation of any of the provisions of law, the obligors will pay the amount stated in said bond. Said bond shall be in such form as the Commissioner of Internal Revenue shall prescribe.

art. 1, s. 1.

These sections are oppressive, tending to enlarge the rich and impoverish the poor.

A man, by long apprenticeship, has acquired skill; by frugality and industry he has amassed enough to purchase a still and a few tools, which he has on leased land; or he

has acquired the fee of a distillery, largely incumbered by mortgage,—his credit is exhausted; yet, before he can gain a livelihood by his skill, or use his property,—notwithstanding he is ready, and willing to pay all excises which may be levied, and notwithstanding that his body is amenable for the debt,—he must find a bondsman, to be surety for him, for $5,000 or more; must clear the property from all incumbrances, that it, too, may be security; must owe no man anything; cannot even buy grain or cattle, and give warehouse receipts for them, as security for the capital necessary for his business,—all he has, and a clear title to it at that, must be at the mercy of Government, to secure a paltry debt.

A rich man, with a 500 bushel house, which will cost some.....	$70,000
U. S. Bonds to deposit, equal to 15 days tax,..	35,000
Money to buy cattle,.....	30,000
Capital to run on,.....	40,000
Total,.....	$175,000

—enough money to retire on,—can be licensed; and, because none with less capital can start, or compete, he will be sure of making money.

Does this illustrate the absolute rights, reserved to us and our posterity, and not disparaged by the Constitution: to acquire and enjoy property?

See *Wynehammer* v. *The People* (cited ante).

In every other trade, the credit system is the legitimate and only method, whereby a poor man can acquire property;—his freedom to pledge it, is one of the elements of its enjoyment: He may rent his store, or mortgage it for all it is worth,—may store half his stock away till needed, and give warehouse receipts or chattel mortgages,

to raise money to carry on his business; but no distiller can acquire property through these universal means,—the very means wont to be employed even by him.

And it resolves itself simply into a denial of his right to acquire or enjoy, unless he is rich enough, so that he does not need to acquire.

Again: the Assessor may refuse to approve the bond (and thus forbid the use of the property), when, in his judgment, the situation of the distillery is such as to enable the distiller to defraud. Appeal may be had to the autocrat of the Statute, whose word is law.—And it is said the Courts have no power to compel the right from any of these officers, by Mandamus or otherwise.

Forejudged of crime, presumed guilty till proved innocent,—it is not enough that his property is bound as security, that he must find pledges for his good behavior, that he must surrender to another the command and keeping of his own property, enjoying it as best he may under the locks, keys and bolts of a stranger, yet open to assault and rapine, that his body must be liable, his secrets exposed, and his business, skill, and credit, at the mercy of every one of that most execrable class of all mankind, who go about seeking to entrap the unwary, for a reward; it is not enough that he must bear all this, and the insolence of base men, clad in a little brief authority; more is required:—his distillery must be so located, that he cannot defraud!

(Art. 1, S. 1; Art. 1, S. 8, 18; Art. 3, S. 1; Amendments 5, 8, 9 10.)

Sec. 9. *And be it further enacted*, That every distiller and person intending to engage in the business of a dis-

tiller shall, previous to the approval of his bo
be made, under the direction of the assessor o
an accurate plan and description, in triplicate
tillery and distilling apparatus, distinctly sho
cation of every still, boiler, doubler, worm tub, and receiving cistern, the course and construction of all fixed pipes, used or to be used in the distillery, and of every branch thereof, and of every cock, or joint thereof, and of every valve therein, together with every place, vessel, tub, or utensil from and to which any such pipe shall lead, or with which it communicates. Such plan and description shall also show the number and location and cubic contents of every still, mash tub, and fermenting tub, together with the cubic contents of every receiving cistern, and the color of each fixed pipe, as required in this act. One copy of said plan and description shall be kept displayed in some conspicuous place in the distillery; two copies shall be furnished to the assessor of the district, one of which shall be kept by him and the other transmitted to the Commissioner of Internal Revenue. The accuracy of every such plan and description shall be verified by the assessor, the draughtsman and the distiller; and no alteration shall be made in such distillery without the consent, in writing, of the assessor, which alteration shall be shown on the original, or by a supplemental plan and description, and a reference thereto noted on the orignal, as the assessor may direct; and any supplemental plan and description shall be executed and preserved in the same manner as the original.

Section 9, requiring him to publish his inventions and arrangements, is inquisitorial (See comments on Sec. 6, ante), and, in forbidding any alteration to be made in any

to raise money to carry on his business; but no distiller can acquire property through these universal means,—the very means wont to be employed even by him.

And it resolves itself simply into a denial of his right to acquire or enjoy, unless he is rich enough, so that he does not need to acquire.

Again: the Assessor may refuse to approve the bond (and thus forbid the use of the property), when, in his judgment, the situation of the distillery is such as to enable the distiller to defraud. Appeal may be had to the autocrat of the Statute, whose word is law.—And it is said the Courts have no power to compel the right from any of these officers, by Mandamus or otherwise.

Forejudged of crime, presumed guilty till proved innocent,—it is not enough that his property is bound as security, that he must find pledges for his good behavior, that he must surrender to another the command and keeping of his own property, enjoying it as best he may under the locks, keys and bolts of a stranger, yet open to assault and rapine, that his body must be liable, his secrets exposed, and his business, skill, and credit, at the mercy of every one of that most execrable class of all mankind, who go about seeking to entrap the unwary, for a reward; it is not enough that he must bear all this, and the insolence of base men, clad in a little brief authority; more is required:—his distillery must be so located, that he cannot defraud!

(Art. 1, S. 1; Art. 1, S. 8, 18; Art. 3, S. 1; Amendments 5, 8, 9 10.)

SEC. 9. *And be it further enacted*, That every distiller and person intending to engage in the business of a dis-

tiller shall, previous to the approval of his bond, cause to be made, under the direction of the assessor of the district, an accurate plan and description, in triplicate, of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, worm tub, and receiving cistern, the course and construction of all fixed pipes, used or to be used in the distillery, and of every branch thereof, and of every cock, or joint thereof, and of every valve therein, together with every place, vessel, tub, or utensil from and to which any such pipe shall lead, or with which it communicates. Such plan and description shall also show the number and location and cubic contents of every still, mash tub, and fermenting tub, together with the cubic contents of every receiving cistern, and the color of each fixed pipe, as required in this act. One copy of said plan and description shall be kept displayed in some conspicuous place in the distillery; two copies shall be furnished to the assessor of the district, one of which shall be kept by him and the other transmitted to the Commissioner of Internal Revenue. The accuracy of every such plan and description shall be verified by the assessor, the draughtsman and the distiller; and no alteration shall be made in such distillery without the consent, in writing, of the assessor, which alteration shall be shown on the original, or by a supplemental plan and description, and a reference thereto noted on the orignal, as the assessor may direct; and any supplemental plan and description shall be executed and preserved in the same manner as the original.

Art. 1, S. 8. 18. Amendm to 5. 9. 10.

Section 9, requiring him to publish his inventions and arrangements, is inquisitorial (See comments on Sec. 6, ante), and, in forbidding any alteration to be made in any

cock, joint, pipe or place where any pipe may leak, is tyrannous, and without authority: A water pipe may spring a leak, a joint prove defective, or an accident compel him to put in a pipe not exactly sky-blue; he must run for one of his custodians, and obtain his consent in writing,—and there is nothing which compels this consent; —money may be extorted for it, or caprice refuse it altogether; and, after the consent is obtained, the tint must be applied before use can be made of it; truly,—if this man enjoys the property he has acquired, it must be admitted that he does it under difficulties.

(Art. 1, S. 8, 18; Amendments 5, 9, 10.)

We say there is nothing to compel these officers to perform any acts, under the Statute. It was adjudged below, that the Circuit Court has no power to compel them by Mandamus,—and this Appeal is, in part, from that decision.

The general principles of these last three Sections are fully discussed ante.

Art. 1, S. 8. 18.

Amendmts 4. 10.

SEC. 10. *And be it further enacted*, That immediately after the passage of this act every assessor shall proceed, at the expense of the United States, with the aid of some competent and skillful person, to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered or intended to be registered for the production of spirits in his district, to estimate and determine its true producing capacity, and in like manner shall estimate and determine the capacity of any such distillery as may hereafter be so registered in said district, a written report of which shall be made in triplicate, signed

by the assessor and the person aiding in making the same, one copy of which shall be furnished to the distiller, one retained by the assessor, and the other immediately transmitted to the Commissioner of Internal Revenue. If the Commissioner of Internal Revenue shall at any time be satisfied that such report of the capacity of a distillery is in any respect incorrect or needs revision, he shall direct the assessor to make in like manner another survey of said distillery; the report of said survey shall be executed in triplicate and deposited as hereinbefore provided.

We submit that this Section opens private affairs too much to wanton curiosity, and that the presumption is, that the original application and general description, sufficient, under our comments on Section 6, is true; —that, if the Assessor, or any other person, has any reason to suspect that it is not true, and that the distiller is committing a crime in running,—if he make oath before a magistrate to the facts, and *he* shall believe that sufficient cause is shown, he will issue a warrant to search the premises particularly described therein,—and that this is as great and sufficient a remedy as is consistent with liberty.

Further we object to this Section as giving additional powers to the Commissioner, the inquisitor general, or autocrat of this Act.

(Art. 1, S. 8, 18; Amendment 4 & 10.)

Art. 1, S. 8. 18.

SEC. 11. *And be it further enacted*, That after the passage of this act it shall not be lawful for any assessor to

Amendmts 5. 9. 10.

assess a special tax upon any distiller or for the collector to collect the same, or for any distiller who has heretofore paid a special tax as such to continue the business of distilling until such distiller shall have given the bond required by this act, and shall have complied with the provisions of law having reference to the registration and survey of distilleries, and having reference to the arrangement and construction of distilleries, and the premises connected therewith, in manner and as required by this act; nor shall it be lawful for any assessor of internal revenue to assess, or for any collector to collect, any special tax for distilling on any premises distant less than six hundred feet from any premises used for rectifying, nor shall any assessor assess or collector collect any special tax for rectifying distilled spirits on any premises distant less than six hundred feet from any distillery when the distillery and rectifying establishments are occupied and used by different persons; nor shall the process of distillation and rectification both be carried on within the distance of six hundred feet. In all cases where a distillery and rectifying establishment, distant the one from the other less than six hundred feet, are occupied and used by the same person, said person shall have the right to elect which business shall be discontinued at that place. In all cases where rectifying or distilling shall be discontinued under the provisions of this section, and the time for which the special tax for rectifying or distilling was paid remains unexpired, the Secretary of the Treasury is hereby authorized to refund out of any money in the treasury not otherwise appropriated, on requisition of the Commissioner of Internal Revenue, a proportionate part of any sum originally paid for special tax therefor, which shall be in such ratio to the whole sum paid as the unexpired time for which special

tax was paid shall bear to the whole term for which the same was paid. Any collector or assessor of internal revenue who shall fail to perform any duty imposed by this section, or shall assess or collect any special tax in violation of its provisions, shall be liable to a penalty of five thousand dollars for each offense.

amendmt 8. art. 1, S. 8. 18.

Can anything be added to the chains, imposed by the preceeding Sections? Can any other curb be attached to prevent this forejudged criminal from crime? Look back to the narration of the sureties, the custodians, the securities, the judgment of the Assessor that no fraud can be committed, and—what can ingenuity add?—Ah!—the assessor's judgment may be at fault!—assurance must be doubly sure:—if there be within 600 feet, a tea-pot still, or a barrel of gravel stones through which spirits are leached,—no license can, in any event, be granted.

Let us consider the glorious liberty of this law: A man who, by long years of patient industry, of privation, of deep laid plans, and sleepless nights, has attained the proud satisfaction of knowing that he is excelled by no man in his skill, and that the splendid establishment is, at last, through his weary labor, clear from all incumbrance. —He applies for license and—is refused!

Already he has paid Government for, and obtained a license, which empowered him to run, and, on faith in that, has spent his last dollar, preparing to start. But—the new law comes; another is licensed 590 feet from his,—he cannot run. His children ask for bread;—with no skill, but for distilling, to earn them food, he must attempt the common and menial labors. Sabbath, at last, gives him a day

of rest; he sits down before his property, and contemplates it as it warps and rots and rusts and crumbles; he reads in a newspaper a notice that large City, State, and County taxes have been levied; and to-morrow the property will be sold to pay them!

And this, his Government calls the enjoyment of his property? thus, is his absolute right to enjoy it, preserved to him!—Like the Aztec victim, he is compelled to smile, and enjoy the contemplation of his own sacrifice!

(Art. 1, S. 8, 18; Amendments 5, 8, 9, 10.)

Art. 1, S. 8. 18. Amendmts 5. 9. 10.

SEC. 12. *And be it further enacted*, That no person shall use any still, boiler, or other vessel for the purpose of distilling in any dwelling-house, nor in any shed, yard or inclosure connected with any dwelling-house nor on board of any vessel or boat, nor in any building or on any premises where beer, lager beer, ale, porter, or other fermented liquors, vinegar or ether are manufactured or produced, or where sugars or sirups are refined, or where liquors of any description are retailed, or where any other business is carried on, nor within six hundred feet from any premises authorized to be used for rectifying; and every person who shall use any still, boiler, or other vessel for the purpose of distilling, as aforesaid, in any building or other premises where the above specified articles are manufactured, produced, refined, or retailed, or other business is carried on, or on board of any vessel or boat, or in any dwelling-house, or other place as aforesaid, or shall aid or assist therein, or who shall cause or procure the same to be done, shall, on conviction, be fined one thousand dollars and imprisoned for not less than six months nor more than

Amendmt 8.

two years, in the discretion of the court: *Provided*, That saleratus may be manufactured, or meal or flour ground from grain, in any building or on any premises where spirits are distilled; but such meal or flour only to be used for distillation on the premises.

Magnanimous Section! Saleratus may be manufactured on the premises with highwines!—profound second thought! All preceeding checks might, by some possibility, be evaded,—therefore, new checks!

Again: I ask, how does a power to tax, include a power to forbid or grant monopolies?

(Amendments 5, 8, 9, 10; Art. 1, S. 8, 18.)

Art. 1, S. 8. 18. Amendmts 5. 9. 10.

SEC. 14. *And be it further enacted*, That any person who shall manufacture any still, boiler, or other vessel, to be used for the purpose of distilling, shall, before the same is removed from the place of manufacture, notify in writing the assessor of the district in which such still, boiler, or other vessel is to be used or set up, by whom it is to used, its capacity, and the time when the same is to be removed from the place of manufacture; and no such still, boiler, or other vessel shall be set up without the permit in writing of the said assessor for that purpose; and any person who shall set up any such still, boiler, or other vessel, without first obtaining a permit from the said assessor of the district in which such still, boiler, or other vessel is intended to be used, or who shall fail to give such notice, shall pay in either case the sum of five hundred dollars, and shall forfeit the distilling apparatus thus removed or set up in violation of law.

" 8

The machinist and coppersmith must also come under the control of the assessor; they must beg, or buy, of him, permission to sell their own, or set it up. To the Governor they, too, must kneel, and beg and offer presents.

(Amendments 5, 8, 9 and 10; Art. 1, S. 8, 18.)

Art. 1, S. 8. 18. Amendments 5. 9. 10.

SEC. 15. *And be it further enacted*, That every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, to be used only for the storage of distilled spirits, of his own manufacture; but no dwelling-house shall be used for such purpose, and no door, window, or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper assigned thereto by the Commissioner of Internal Revenue; and the tax on the spirits stored in such warehouse shall be paid before removal from such warehouse.

4. —

Section 15 gives us variety: *will he, nill he*—he must have a warehouse, and he must pay for it too. Our old friend, the Autocrat Commissioner, will command him how to build it; and the bailiff of this Act,—under a rather irregular warrant, since it was issued by the legislative power, and not supported by oath, nor discription of the

property,—shall seize it, and install his bum-bailiff as keeper.

(Amendments 4, 5, 9, 10; Art. 1, S. 8, 18).

SEC. 16. *And be it further enacted*, That the owner, agent or superintendent of any distillery, established as hereinbefore provided, shall erect, in a room or building to be provided and used for that purpose, and no other, and to be constructed in the manner to be prescribed by the Commissioner of Internal Revenue, two or more receiving cisterns, each to be at least of sufficient capacity to hold all the spirits distilled during the day of twenty-four hours, into which shall be conveyed all the spirits produced in said distillery; and each of said cisterns shall be so constructed as to leave an open space of at least three feet between the top thereof and the floor or roof above, and of not less than eighteen inches between the bottom thereof and the floor below, and shall be so situated that the officer can pass around the same, and shall be connected with the outlet of the worm or condenser by suitable pipes or other apparatus so constructed as always to be exposed to the view of the officer, and so connected and constructed as to prevent the abstraction of spirits while passing from the outlet of the worm or condenser back to the still or doubler, or forward to the receiving cistern; such cisterns and the room in which they are contained shall be in charge of and under the lock and seal of the internal revenue gauger designated for that duty; and on the third day after the spirits are conveyed into such cisterns the same shall be drawn off into casks under the supervision of such gauger in the presence of the storekeeper, and be removed directly to the distillery warehouse; and on

Amendments 9. 5. 10. Art. 1, S. 1. Art. 1, S. 8. 18. Amendments 4. 5.

special application to the assessor or assistant assessor by the owner, agent, or superintendent of any distillery, the spirits may be drawn off from the said cisterns under the supervision of the gauger at any time previous to the third day. All locks and seals required by law shall be provided by the Commissioner of Internal Revenue at the expense of the owner of the distillery or warehouse; and the keys shall be in charge of the collector or such gauger as he may designate.

Section 16, again commits to the Commissioner legislative authority,—again requires the distiller to obtain and own property, without consulting his desires, and arbitrarily commands how he shall construct his own,—takes absolute possession of a portion of his realty, and seizes the thing taxed, to secure the amount of the tax, notwithstanding the debtor is ready to pay, and tenders the debt.

"If he doth pay the money then the pledge is dead. If "he will tender the same * * * * and the feoffee "refuseth, then he hath an estate * * * clearly, with-"out condition." Co. Litt., pp. 205, a 207. c.

(Amendments 4, 5, 9 & 10; Art. 1, S. 1; Art. 1, S. 8, 18.)

SEC. 17. *And be it further enacted*, That the door of the furnace of every still or boiler used in any distillery shall be so constructed that it may be securely fastened and locked. The fermenting tubs shall be so placed as to be easily accessible to any revenue officer, and each tub shall have distinctly painted thereon in oil colors its cubic con-

tents in gallons, and the number of the tub. There shall be a clear space of not less than one foot around every wood still, and not less than two feet around every doubler and worm tank. The doubler and worm tanks shall be elevated not less than one foot from the floor; and every fixed pipe to be used by the distiller, except for conveyance of water, or of spent mash or beer only, shall be so fixed and placed as to be capable of being examined by the officer for the whole of its length or course, and shall be painted, and kept painted, as follows; that is to say: Every pipe for the conveyance of mash or beer shall be painted of a red color; every pipe for the conveyance of low wines back into the still or doubler shall be painted blue; every pipe for the conveyance of spirits shall be painted black; and every pipe for the conveyance of water shall be painted white. If any fixed pipe shall be used by any distiller which shall not be painted or kept painted as herein directed, or which shall be painted otherwise than as herein directed, he shall forfeit the sum of one thousand dollars. No assessor shall approve the bond of any distiller until all the requirements of the law and all regulations made by the Commissioner of Internal Revenue in relation to distilleries, in pursuance thereof, shall have been complied with. Any assessor who shall violate the provisions of this section shall forfeit and pay two thousand dollars, and shall be dismissed from office.

Art. 3, S. 1.

Art. 1, S. 1.

Amendmt 8.

Section 17 regulates the construction, or requires the reconstruction of distillery property:

So shalt thou do, and no otherwise.

(Art. 1, S. 1. Art. 1, S. 8, 18. Amendments 5, 9, 8 and 10.)

SEC 18. *And be it further enacted*, That every person engaged in distilling or rectifying spirits, and every wholesale liquor dealer and compounder of liquors, shall place and keep conspicuously on the outside of his distillery, rectifying establishment or place of business, a sign, in plain and legible letters, not less than three inches in length, painted in oil colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier, wholesale dealer, or compounder, with the words: "Registered distillery," "rectifier of spirits," "wholesale liquor dealer," or "compounder of liquors," as the case may be; and no fence or wall of a height greater than five feet shall be erected or maintained around the premises of any distillery, so as to prevent easy and immediate access to said distillery; and every distiller shall furnish to the assessor of the district as many keys of the gates and doors of the distillery as may be required by the assessor, from time to time, for any revenue officer or other person who may be authorized to make survey or inspections of the premises or of the contents thereof; and said distillery shall be kept always accessible to any officer or other person having any such key. Any person who shall violate any of the foregoing provisions of this section by negligence or refusal, or otherwise, shall pay a penalty of five hundred dollars. Any person not having paid the special tax, as required by law, who shall put up the sign required by this section, or any sign indicating that he may lawfully carry on the business of a distiller, rectifier, wholesale liquor dealer, or compounder of liquors, shall forfeit and pay one thousand dollars, and, on conviction, shall be imprisoned not less than one month nor more than six months; and any person who shall work in any distillery, rectifying establishment, wholesale liquor store,

art. 1, s. 8. 18. amendmts 4. 5. 8. 9. 10.

or in the store of any compounder of liquors, on which no sign shall be placed and kept as hereinbefore provided, and any person who shall knowingly receive at, carry or convey any distilled spirits to or from any such distillery, rectifying establishment, warehouse, or store, or who shall knowingly carry and deliver any grain, molasses, or other raw material to any distillery on which such sign shall not be placed and kept, shall forfeit all horses, carts, drays, wagons, or other vehicle or animal used in carrying or conveying of such property aforesaid, and, on conviction, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than six months.

Section 18. I believe the common law authorizes the prescription of a sign or badge for licensed traders or persons, and with good reason; and with this prescription terminates the power of this Section.

Every man has a right to erect around his premises a sufficient enclosure to make it utterly inaccessible to thieves, robbers, or trespassers.

He may not only acquire and possess, but he may also protect his property.

Section One, seized the property constructively, as a pledge; this Section seizes it absolutely, and in possession; for the keys of all gates and doors, and duplicates, enough for an army, must be delivered to the officers.

It is not enough that the party, guilty of negligence in failing to place his three inch sign over his door shall suffer a grievous punishment;—the poorest operative who must starve, steal or work, must be included.—All that a man

hath will he give for his life; therefore, he will not starve; —to steal is wrong, and its devious channel will throw him on the rocks of punishment;—Scylla he avoids, and turns his craft into the clear channel of labor; alas! Charybdis, worse than Scylla, now impends, and fate remorselessly whirls him on, to destruction. Had he stolen, to allay hunger, mercy would have softened its reproach, and made a day's imprisonment his only punishment;—he has worked—and a month's imprisonment, and the loss of his all, (his wain) is the lightest penalty.

(Art. 1, S. 8, 18; Amendments 4, 5, 8, 9 and 10.)

Art. 1, S. 8. 18. Amendmts 5. 9. 10.

Art. 1, S. 1. —

SEC. 19. *And be it further enacted*, That every person making or distilling spirits, or owning any still, boiler, or other vessel used for the purpose of distilling spirits, or having such still, boiler, or other vessel so used, under his superintendence, either as agent or owner, or using any such still, boiler, or other vessel, shall, from day to day, make, or cause to be made, true and exact entry, in a book or books, to be kept by him, in such form as the Commissioner of Internal Revenue may prescribe, of the kind of materials, and the quantity in pounds, bushels, or gallons, purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered at said distillery, together with the amount paid therefor, the kind and quantity of fuel purchased for use in the distillery, and from whom purchased, the amount paid for ice or water for use in the distillery, the repairs placed on said distillery or distilling apparatus, the cost thereof, and by whom and when made, and [of] the name and residence of each person employed in or about the distillery, and in what capacity employed; and in another book shall

make entry [of] the quantity of grain or other material used for the production of spirits, the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermentation, the quantity of mash in each tub, designating the same by the number of the tub, the number of dry inches, that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting, the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity and temperature at the hour of 12 meridian; also the time when any fermenting tub is emptied of ripe mash or beer, the number of gallons of spirits distilled, the number of gallons placed in warehouse, and the proof thereof, and the number of gallons sold or removed, with the proof thereof, and the name, place of business, and residence of the person to whom sold; and every fermenting tub shall be emptied at the end of the fermenting period, and shall remain empty for a period of twenty-four hours. On the 1st, 11th, and 21st days of each month, or within five days thereafter, respectively, every distiller shall render to the assistant assessor an account in duplicate, taken from his books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits produced and placed in warehouse. And the distiller or the principal manager of the distillery shall make and subscribe the following oath, to be attached to said return:

"I ——— ———, distiller, (or principal manager as the case may be), of the distillery at ——, do solemnly swear that, since the date of the last return of the business of said distillery, dated —— day of ——, to the —— day

of ——, both inclusive, there was produced in said distillery, and withdrawn and placed in warehouse, the number of wine gallons and proof gallons of spirits, and there were actually mashed and used in said distillery, and consumed in the production of spirits therein, the several quantities of grain, sugar, molasses, and other materials, respectively, hereinbefore specified, and no more."

The said book shall always be kept at the distillery, and be always open to the inspection of any revenue officer, and when filled up, shall be preserved by the distiller for a period not less than two years thereafter, and, whenever required, shall be produced for the inspection of any revenue officer. If any false entry shall be made Amendmt 8 in either of said books, or any entry required to be made therein shall be omitted therefrom, for every such false entry made, or omission, the distiller shall forfeit and pay a penalty of one thousand dollars. And if any such false entry shall be made, or any entry shall be omitted therefrom, with intent to defraud or to conceal from the revenue officers any fact or particular required to be stated and entered in either of said books, or to mislead in reference thereto, or if any distiller as aforesaid, shall omit or refuse to provide either of said books, or shall cancel, obliterate, or destroy, any part of either of such books, or any entry therein, with intent to defraud, or shall permit the same to be done, or such books, or either of them, be not produced when required by any revenue officer, the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property of every kind and description on said premises, used in the business there carried on, shall be forfeited to the United States. And any person making such false entry or omitting to make

any entry hereinbefore required to be made, with the intent aforesaid, or who shall cause or procure the same to be done, or who shall fraudulently cancel, obliterate, or destroy any part of said books, or any entry therein, or who shall wilfully fail to produce such books or either of them, on conviction, shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

Section 19, again empowers the Commissioner to legislate; again the distiller must purchase property at his dictation, again the secrets of his trade are invaded, and all the minutia of a man's private affairs exposed to the wanton view and capricious impertinence of any of the army of sleuth hounds, nosing after scent of fraud.

Again, the smallest offence is visited with unmeasured punishment.

If his book-keeper, or he, is sick; or a porter forgets to return, or mistakes the weight of a load of coal—amerce him $1,000.

If at midnight a powerful man, with ruffian look and insolent manner, demands that he open his safe, and produce his books,—and he refuse,—$500 fine, and half a year's imprisonment,—the lightest penalty,—will soon break his will, so that he shall wilfully refuse nothing.

(Art. 1, S. 8, 18; Art. 1, S. 1; Amendments 5, 9, 8 and 10.

SEC. 20. *And be it further enacted*, That on receipt of the distiller's first return in each month, the assesor shall

Art. 1, S. 8. 18. Void, for uncertainty. p. 216, ante.

amendments 5. 9. 10.

inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and 45 gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of four dollars for every cask of 40 proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery, as estimated under the provisions of this act.

Art. 3, s. 1.

Section 20. To understand this Section, let us consider an Assessor in the abstract:

An Assessor is a person elected or appointed, on account of his fitness and expertness, to assess a value upon each man's property, so that the relative amount of the public burden each must bear, may be computed therefrom, by a ministerial officer.

His office is a mixed one: partly ministerial, partly judicial. The property which he shall assess, is ascertained by law; the quantities which he shall assess, are ascer-

tained by ownership; the time and manner of assessment are designated.

If in any one thing he fails,—jurisdiction to perform his one judicial act never obtains, and his assessment is void; —his only judicial act is that for which he is peculiarly fitted, viz: deciding what is the value of the property in question.

In this matter we claim there can be no assessor; for, there is no judicial act for him to perform: The tax is laid without respect to value, and in ascertaining the amount on which the tax may be laid, though he may have become positively sure that the distiller did not produce more than 40 per cent. of the producing capacity of the distillery,—he must enter judgment for double that amount. This is not the free judgment of a judicial officer, but is the mere ministerial service of a clerk: first he ascertains whether the return of the distiller has returned 80 per cent. of his producing capacity,—if not, he goes through an *ex parte* form of trial, says the return is one gallon too little, therefore, he must make an arbitrary increase as directed by this section.

If, then, he does not exercise the judicial powers of an assessor, there is but one other source from whence due process of law can issue to divest the property of the citizen, viz: the Courts.

(Amendments 5, 9 and 10; Art. 3, S. 1; Art. 1, S. 8, 18).

(This Section and its operations have been fully considered in Sections 66 to 76 ante, pp. 187 to 221.)

Sec. 21. *And be it further enacted*, That the storekeeper assigned to any distillery warehouse shall also have charge of the distillery connected therewith; and, in addition to

Amendmts 5. 9. Art. 1, S. 8. 18.

the duties required of him as a storekeeper in charge of a warehouse, shall keep in a book to be provided for that purpose, and in the manner to be prescribed by the Commissioner of Internal Revenue, a daily account of all the meal and vegetable productions or other substances brought into said distillery, or on said premises, to be used for the purpose of producing spirits, from whom purchased, and when delivered at said distillery, the kind and quantity of all fuel used, and from whom purchased, and of all repairs made on said distillery, and by whom and when made, the names and places of residence of all persons employed in or about the distillery, of the materials put into the mash tub, or otherwise used for the production of spirits, the time when any fermenting tub is emptied of ripe mash or beer, recording the same by the number painted on said tub, and of all spirits drawn from the receiving cistern, and the time when the same were drawn off. Any distiller or person employed in any distillery who shall use, cause, or permit to be used any material for the purpose of making mash, wort, or beer, or for the production of spirits, or shall remove any spirits in the absence of the storekeeper or person designated to act as said storekeeper, shall forfeit and pay double the amount of taxes, on the spirits so produced, distilled, or removed, and, in addition thereto, be liable to a penalty of one thousand dollars.

Amendmts 8. 10.

Section 21, continues the seizure commenced by section 15, and designates the custodian: If the seizure is void, and the custodian has no rights within the walls, we will give him the outside, and see that he gets no information from within, save as he hangs about the corners, guessing

at the amount of loads which he may see enter the enclosure, and prys, with the tricks of a detective, into the affairs of our business. Much good may his report do to his master!

It is plain that the only object, in placing the mans business under the espionage of this official, and registering every item brought into the premises, with the names of their vendors, and the names and residences of every person, who even repairs the slightest thing, is the same which would induce a detective searching for evidence of crime, and no other.

How forced acquiescence, in the complete exposure of all his matters, even the most trivial, can be reconciled with the freedom, by which every man may do as he pleases, without question from any superior, so long as he injures no one and commits no crime, no one can answer.

The last clause is without a parallel. Any innocent person who shall use his own for a legitimate purpose in the absence of his tyrant shall be *grievously* punished. My cheeks burn with shame, to think, that an American could frame a system of such degrading servitude.

(Amendments 5, 8, 9 & 10. Art. 1, s. 1. Art. 1, s. 8, 18.)

Sec. 22. *And be it further enacted*, That every distiller, at the hour of twelve meridian, on the third day after that on which his bond shall have been approved by the assessor, shall be deemed to have commenced and thereafter to be continuously engaged in the production of distilled spirits in his distillery, except in the intervals when he shall have suspended work, as hereinafter authorized

or provided. Any distiller desiring to suspend work in distillery may give notice in writing to the assistant assessor of his division, stating when he will suspend work; and on the day mentioned in said notice said assistant assessor shall, at the expense of the distiller, proceed to fasten securely the door of every furnace of every still or boiler in said distillery, by locks or otherwise, and shall adopt such other means as the Commissioner of the Internal Revenue shall prescribe to prevent the lighting of any fire in such furnace or under such stills or boilers. The locks and seals, and other materials required for such purpose, shall be furnished to the assessor of the district by the Commissioner of Internal Revenue, to be duly accounted for by the said assessor. Such notice by any distiller, and the action taken by the assistant assessor in pursuance thereof, shall be immediately reported to the assessor of the district, and by him transmitted to the Commissioner of the Internal Revenue. No distiller, after having given such notice, shall, after the time stated therein, carry on the business of a distiller on said premises until he shall have given another notice in writing to said assessor, stating the time when he will resume work; and at the time so stated for resuming work, the assistant assessor shall attend at the distillery to remove said locks and other fastenings; and thereupon, and not before, work may be resumed in said distillery, which fact shall be immediately reported to the assessor of the district, and by him transmitted to the Commissioner of Internal Revenue. Any distiller, after the time fixed in said notice declaring his intention to suspend work, who shall carry on the business of a distiller on said premises, or shall have mash, wort, or beer in his distillery, or on any premises connected therewith, or who shall have in his possession or under

Amendm^ts 4. 5. 9. 10. Art. 1, S. 1.

Art. 1, S. 8. 18.

his control any mash, wort, or beer, with intent to distil the same on said premises, shall incur the forfeitures and be subject to the same punishment as provided for persons who carry on the business of a distiller without having paid the special tax.

Amendmt 8.

Section 22, adds a little variety to the seizure, by making it perfect as to the furnaces, ousting the owner of all right, even to see them.

This section also lays the penalties in unmitigated severity.

(Amendments 4, 5, 8, 9 & 10; Art. 1, s. 1; Art. 1, s. 8, 18.)

Sec. 23. *And be it further enacted*, That all distilled spirits shall be drawn from the receiving cistern into casks, each of not less capacity than twenty gallons wine measure, and shall thereupon be gauged, proved, and marked by an internal revenue gauger, by cutting on the cask containing such spirits, in a manner to be prescribed by the Commissioner of the Internal Revenue, the quantity, in wine gallons and in proof gallons, of the contents of such cask, and shall be immediately removed into the distillery warehouse, and the gauger shall, in the presence of the storekeeper of the warehouse, place upon the head of the cask an engraved stamp, which shall be signed by the collector of the district and the storekeeper and gauger, and shall have written thereon the number of proof gallons contained therein, the name of the distiller, the date of the receipt in the warehouse, and the serial number of each cask, in progressive order, as the same shall be received from the distillery. Such serial number for

Art. 1, S. 8. 18.
Amendmts 5. 9. 10.
— 4.

every distillery shall begin with number one (No. 1) with the first cask deposited therein after this act takes effect, and no two or more casks warehoused at the same distillery shall be marked with the same number. The said stamp shall be as follows:

Distillery warehouse stamp No.——.

Issued by ————, collector, ——— district, State of———. Distillery warehouse of ———, 18—. Cask No.——, contents——gallons, proof spirit.

——— ———

United States Storekeeper.

Attest:

——— ———

United States Gauger.

Art. 1, s. 1. And the distiller or owner of all spirits so removed to the distillery warehouse shall on the first, eleventh, and twenty-first days of each month, or within five days thereafter, enter the same for deposit in such warehouse, under such rules and regulations, not inconsistent herewith, as the Commissioner of the Internal Revenue may prescribe; and said entry shall be in the triplicate and shall contain the name of the person making the entry, the designation of the warehouse in which the deposit is made, and the date thereof, and [shall] be in form as follows:

Entry for deposit in distillery warehouse.

Entry of distilled spirits deposited by ——— ———, in distillery warehouse ——in the —— district, State of ——, on the day of ———, anno domini——.

And the entry shall specify the kind of spirits, the whole number of casks, the marks and serial numbers thereon, the number of gauge or wine gallons, and of proof gallons, and the amount of the tax on the spirits contained in them; all of which shall be verified by the oath or affirm-

ation of the distiller or owner of the same attached to the entry; and the said distiller or owner shall give his bond in duplicate, with one or more sureties satisfactory to the collector of the district, conditioned that the principal named in said bond will pay the tax on the spirits, as specified in the entry, or cause the same to be paid, before removal from said distillery warehouse, and within one year from the date of said bond; and the penal sum of such bond shall not be less than double the amount of the tax on such distilled spirits. One of said entries shall be retained in the office of the collector of the district, one sent to the storekeeper in charge of the warehouse, to be retained and filed in the warehouse, and one sent with the duplicate of the bond to the Commissioner of the Internal Revenue, to be filed in his office.

Amendmt 4.

Sec. 23. Notwithstanding the tax may be tendered, and the spirit is free, the distiller must provide a certain kind of cask, and surrender possesion of both cask and spirits. If Congress has no right to dictate as to the cask, (*License Tax Cases*, 5 Wallace 470.)
or seize the spirits, all the provisions of this section fail.
(Art. 1, s. 8, 18; Art. 1, s. 1; Amendments 5, 9, 10 & 4.)

Sec. 24. *And be it further enacted*, That any distilled spirits may, on payment of the tax thereon, be withdrawn from warehouse on application to the collector of the district in charge of such warehouse, on making a withdrawal entry, in duplicate, and in form as follows:

Art. 1, S. 8. 18.

Entry for withdrawal of distilled spirits from warehouse, Tax paid.

Entry of distilled spirits to be withdrawn, on payment of the tax, from —— warehouse by —— ——, deposited on the —— day of ——, anno Domini ——, by —— ——. in said warehouse.

And the entry shall specify the whole number of casks with the marks and serial numbers thereon, the number of gauge or wine gallons, and of proof gallons, and the amount of the tax on the distilled spirits contained in them; all of which shall be verified by the oath or affirmation of the person making such entry; and on payment of the tax the collector shall issue his order to the storekeeper in charge of the warehouse for the delivery. One of said entries shall be filed in the office of the collector, and the other transmitted by him to the Commissioner of Internal Revenue.

Amendmt 4.

(Art. 1, S. 8, 18; Amendment 4.)

Amendmts 9. 10.

Art. 1, s. 8. 18.

SEC. 25. *And be it further enacted*, That whenever an order is received from the collector for the removal from any distillery warehouse of any cask of distilled spirits, on which tax has been paid, it shall be the duty of the gauger by whom the same is gauged and inspected, in presence of the storekeeper, before such cask has left the warehouse, to place upon the head thereof, in such manner as to cover no portion of any brand or mark prescribed by law already placed thereon, a stamp, on which shall be engraved the number of proof gallons contained in said cask on which the tax has been paid, and which shall be signed by the

collector of the district, storekeeper, and gauger, and which shall state the serial number of the cask, the name of the person by whom the tax was paid, and the person to whom and the place where it is to be delivered, which stamp shall be as follows:

Tax-paid stamp No. ——.

Received ——— ———, 18—, from ——— ———, tax on —— gallons proof spirit, cask No. —, ——— warehouse at ——, for delivery to ——— at ———.

——— ———,

Collector —— District, State of ——.

Attest:

——— ———,

U. S. Storekeeper.

——— ———,

U. S. Gauger.

And at the time of fixing the tax-paid stamp or stamps, the gauger shall, in the presence of the storekeeper, cut or burn upon each cask the name of the distiller, the district, the date of the payment of (the) tax, the number of proof gallons, and the number of the stamp, which cutting or burning shall be erased when such cask is emptied, by cutting or burning a canceling line across such marks or brands. Whenever any cask or package of rectified spirits shall be filled for shipment, sale, or delivery, on the premises of any rectifier, who shall have paid the special tax required by law, it shall be the duty of a United States gauger to gauge and inspect the same and place thereon an engraved stamp, which shall be signed by the collector of the district and the said gauger, and state the date when affixed, and the number of proof gallons, which stamp shall be as follows:

Stamp for rectified spirits No. ——.

Issued by ——— ———, collector, —— district, State of ———. ——— ———, rectifier of spirits in the ——

district, State of ———, ——— ———, 18—. —— proof gallons.

——— ———,

U. S. Gauger.

Whenever any cask or package of distilled spirits shall be filled for shipment, sale, or delivery on the premises of any wholesale liquor dealer or compounder, it shall be the duty of a United States gauger to gauge and inspect the same, and place thereon an engraved stamp, signed by the collector of the district and the said gauger, stating the name of the compounder or dealer and the date when affixed, and the number of proof gallons, which stamp shall be as follows:

Wholesale liquor dealer's stamp No. ——.

Issued by ——— ———, collector —— district, State of ———. ——— ———, wholesale liquor dealer, of ———, —— district, State of ———, ——— ———, 18—. —— proof gallons.

——— ———,

U. S. Gauger, —— District, State of ———.

All blanks in any of the above forms should be duly filled in accordance with the facts in each case. And the stamps above designated shall be affixed so as to fasten the same securely to the cask or package and duly canceled, and shall then be immediateiy covered with a coating of transparent varnish or other substance, so as to protect them from removal or damage by exposure; and such affixing, cancellation, and covering shall be done in such manner as the Commissioner of Internal Revenue shall by regulation prescribe; but such stamps shall in every case be affixed to a smooth surface of the cask or other package, which surface shall not have been previously painted or covered with any substance.

Art. 1, S. 1.

Section 25. What has Congress to do with the destination of the spirits, after the tax has been paid?

What has it to do with a cask, on which it has no claim and has laid no tax?

(Art. 1, S. 8, 18; Art. 1, S. 1.)

Sections 26, 27, 28 and 29. We submit that, to make a stamp tax practicable, *the stamp must be applied to the article taxed.*

In this case, spirits, as soon as it exists, is the article taxed; *barrels of spirits are not taxed.* A stamp cannot be applied to spirits in the form in which this act taxes them; therefore, these sections are nugatory.

(Art. 1, S, 8, 18; Amendment 8, 9, 10 and 5.)

Amendmts 4. 5. 9.

SEC. 30. *And be it further enacted*, That if any distiller shall desire to reduce the producing capacity of his distillery, he shall give notice of such intention in writing to said assessor, stating the quantity of spirits which he desires thereafter to manufacture or produce every twenty-four hours, and thereupon said assessor shall proceed, at the expense of the distiller, to reduce and limit the producing capacity of the distillery to the quantity stated in said notice, by placing upon a sufficient number of the fermenting tubs close-fitting covers, which shall be securely fastened by nails, seals, and otherwise, and in such manner as to prevent the use of such tubs without removing said covers or breaking said seals, and shall adopt such other precautions as shall be prescribed by the Commissioner of Internal Revenue to reduce the capacity of said distillery. And any person who shall break, injure, or in any manner tamper with any lock, seal, or other fastening applied to

Art. 1, S. 1.

any furnace, still, or fermenting tub, or other vessel, in pursuance of the provisions of this act, or who shall open or attempt to open any door, tub, or other vessel which shall have been locked or sealed, or otherwise closed or fastened as herein provided, or who shall use any furnace, still, or fermenting tub, or other vessel which shall be so locked, sealed or fastened, shall be deemed guilty of a felony, and, on conviction, shall be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned for not less than one year nor more than three years.

Amendmt 8. 10 Art. 1, S. 8. 18.

Section 30, also, makes perfect seizure of a portion of the freehold, and makes it a felony for an innocent man to use his own.

(Art. 1, S. 1; Art. 1, S. 8, 18; Amendments 4, 5 and 9.)

Amendmts 4. 5. 9. 10.

SEC. 31. *And be it further enacted*, That whenever any officer shall require that the water, contained in any worm tub in a distillery, at any time when the still shall not be at work, shall be drawn off, and the tub and worm cleansed, the water shall forthwith be drawn off and the tub and worm cleansed by the distiller or his workmen accordingly; and the water shall be kept and continued out of such worm tub for the space of two hours, or until the officer has finished his examination thereof; and for any refusal or neglect to comply with the requisition of the officer in this behalf, or the provision in this clause contained, the distiller shall forfeit the sum of one thousand dollars, and it shall be lawful for the officer to draw off such water, or any portion of it, and to keep the same drawn off for so long a time as he shall think necessary.

Amendmt 8.

Art. 1 S. 8. 18

Section 31 enjoins military obedience, of the citizen, to the officer who is authorized to command him.

Those revolutionary fathers who framed the Constitution to establish justice and secure liberty, believed that every man had the right to enjoy a *perfect and entire* property in his goods or estate ;—that the rights of liberty and property *are absolute and inalienable rights ;*—yet, now, that very instrument is said to have created a monster, that may overthrow justice and crush liberty, and to have destroyed the amulet which could ward off the power of the fiend.

(Amendments 4, 5, 9, 10 and 8 ; Art. 1, 8, 18.)

SEC. 32. *And be it further enacted*, That it shall be lawful for any revenue officer, AT ALL TIMES, *as well by night as by day*, to enter into any distillery, or building or place, used for the business of distilling, or in connection therewith, for storage or other purposes, and to examine, guage, measure, and take an account of every still or other vessel or utensil of any kind, and of all low wines, and of the quantity and gravity of all mash, wort, or beer, and of all yeast, or other compositions for exciting or producing fermentation in any mash or beer, and of all spirits and of all materials for making or distilling spirits, which shall be in any such distillery or premises, or in the possession of the distiller ; and if any revenue officer, or any person called by him to his aid, shall be hindered, obstructed, or prevented by any distiller or by any workman, or other person acting for such distiller or in his employ, from entering into any such distillery, or building, or place as aforesaid ; or if any such officer shall be by the distiller, or his workman, or any person in his employ, prevented or hindered from, or opposed, or obstructed, or molested in the performance of

Amendments 4. 5. 9. 10.

Amendmt 8 –

his duty under this act, in any respect, the distiller shall forfeit the sum of one thousand dollars. If any officer, having demanded admittance into a distillery or premises of a distillery, and having declared his name and office, shall not be admitted into such distillery or premises by the distiller or other person having charge of the same, it shall be lawful for such officer,

AT ALL TIMES, AS WELL BY NIGHT AS BY DAY,

to break open by force any of the doors or windows, or to break through any of the walls of such distillery or premises necessary to be broken open or through, to enable him to enter the said distillery or premises; and the distiller shall forfeit the sum of one thousand dollars.

Art. 1, S. 8. 18.

Section 32. It shall be lawful for any revenue officer (known or unknown), as well by night as by day, to enter with force, breaking down windows, doors or walls. In addition to the question, whether this is not a violation of the absolute right to enjoy property, I will, hereafter, discuss the inquiry: is, killing the revenue officer, so breaking down and entering, justifiable?

(Amendments 4, 5, 8, 9 and 10; Art. 1, S. 8, 18.)

Art. 1, S. 8. 18.
Amendmts 4. 5. 9. 8. 10.

SEC. 33. *And be it further enacted*, That on the demand of any revenue officer, every distiller, rectifier, or compounder of spirits shall furnish strong, safe, and convenient ladders of sufficient length to enable the officer to examine and guage any vessel or utensil in such distillery or premises; and shall, at all times when required, supply all assistance, lights, ladders, tools, staging, or other things necessary for inspecting the premises, stock, tools, and apparatus belonging to such person, and shall open all doors,

and open for examination all boxes, packages, and all casks, barrels, and other vessels not under the control of a revenue officer in charge, under a penalty of five hundred dollars for every refusal or neglect so to do.

Amendments 4. 5. 9. 10.

SEC. 34. *And be it further enacted*, That it shall be lawful for any revenue officer, and any person acting in his aid, to break up the ground on any part of the distillery or premises of a distiller, rectifier, or compounder of liquors, or any ground adjoining or near to such distillery or premises, or any wall or partition thereof, or belonging thereto, or other place, to search for any pipe, cock, private conveyance, or utensil; and upon finding any such pipe or conveyance leading therefrom or thereto, he may break up any ground, house, wall, or other place through or into which such pipe or other conveyance shall lead, and break or cut away such pipe or other conveyance, and turn any cock, or examine whether such pipe or other conveyance may convey or conceal any mash, wort, or beer, or other liquor which may be used for distillation of low wines or spirits from the sight or view of the officer, so as to prevent or hinder him from taking a true account thereof.

Section 33 and 34: The villein must do the bidding of his lord; to all others he is a freeman, to him he is a slave.

Lyttleton, S. 189; 2 Co. Inst. p. 45.

The latter portion of Section 33, and all of Section 34, form a search warrant,—issued by a power, not judicial, and giving no particular description of the premises to be searched.

(Amendments 4, 5, 9, 8, 10; Art. 1, S. 8, 18.)

Amendment 10. State only can regulate Art. 1, S. 8. 18.

SEC. 35. *And be it further enacted*, That no malt, corn, grain, or other material shall be mashed, nor any wash, wort, or beer brewed or made, nor any still used, by a distiller at any time between the hour of eleven in the afternoon of any Saturday and the hour of one in the forenoon of the next succeeding Monday; and any person who shall violate the provisions of this section shall be liable to a penalty of one thousand dollars.

If I understand the Constitution correctly, the internal police of the States, the prescribing of misdemeanors, and their punishments, is a right reserved to the States. If Congress may make working Sunday a misdemeanor, and impose a fine of $1,000, it may likewise attack petit larceny, or enact an United States Maine Liquor law.

A peculiar hardship of this Section grows out of the manner in which it is carried into effect.

By order of the Commissioner, the fires must be extinguished and the doors of all furnaces &c., locked and barred. The steam will condense in every pipe, and, in spots where they are out of level, water must stand; now a light frost will burst them, and a very cold day would inflict thousands of dollars damages, directly, and, by stopping the still and supply of food to the cattle, would cause irreparable damage to their health and condition,—destroying all profits in feeding them. A 1,000 bushel house will feed 1,000 cattle worth $100,000, and it is a matter of very serious concern to have the profits on so large a capital imperilled; and not only the profits but the capital itself.

The slops contain all the nutrition of the grain, com-

pletely prepared for healthful assimilation, and, of course, no animal can be removed from the very highest and richest diet to coarse unprepared food, without giving its health a shock, from which it will not soon recover. Like all other rich food they improve the condition healthfully—until the system becomes cloyed or accident checks the benefit; then the very richness, makes the reaction greater, and destroys.

(Amendment 10; Art. 1, S. 8, 18).

Amendmts 4. 5. 9. 8. 6. art. 3, s. 2. 3.

SEC. 36. *And be it further enacted*, That all distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States. And in case of the seizure of any distilled spirits found elsewhere than in a distillery, distillery warehouse, or other warehouse for distilled spirits authorized by law, or in the store or place of business of a rectifier, or of a wholesale liquor dealer, or of a compounder of liquors, or in transit from any one of said places; and in case of the seizure of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which shall not have been received into or sent out therefrom in conformity to law, or in regard to which any of the entries required by law to be made in the books of the owner of such spirits or of the storekeeper, wholesale dealer, rectifier, or compounder, have not been made at the time or in the manner required, or in respect to which the owner or person having possession, control, or charge of said spirits shall have omitted to do any act required to be done, or shall have done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed, and that all the requirements

of the law in relation to the payment of the tax have been complied with. And any person who shall remove, or shall aid or abet in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or who shall conceal or aid in the concealment of any spirits so removed, or who shall remove or shall aid or abet in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or who shall conceal, or aid in the concealment of any spirits so removed, shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall, on conviction, be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

amendmt 8 — art. 1, S. 8. 18.

Section 36. We have seen that, if the tax is paid or tendered, the spirits need not enter the warehouse.

If it enters, and the tax is paid, and the spirits withdrawn, the storekeeper, or custodian, is required to make certain entries; if he fails to make these entries, or if the tax on the spirits was paid as soon as it existed, the spirits are seized as a penalty for crime, and the owner is required to prove that no crime has been committed.

Look at a parallel case: The statute prescribes that in case of arrest for murder, the burden of proof shall be upon the prisoner to show no murder has been committed; and in case the proof shall not be made, the arrest shall be sufficient proof, both that murder has been committed, and that the prisoner is guilty thereof.

This Section effectually destroys the right of trial by jury. (See Section 116 of this Argument, *post.*)

3 Kern, 378.

(Amendments 4, 5, 9, 8 & 6; Art. 2, S. 2, 3; Art. 1, S. 8, 18.)

SEC. 37. *And be it further enacted*, That no person shall remove any distilled spirits at any other time than after sun-rising and before sun-setting, in any cask or package containing more than ten gallons, from any premises or building in which the same may have been distilled, redistilled, rectified, compounded, manufactured, or stored, and every person who shall violate this provision shall be liable to a penalty of one hundred dollars for each cask, barrel, or package of spirits so removed; and said spirits, together with any vessel containing the same, and any horse, cart, boat, or other conveyance used in the removal thereof, shall be forfeited to the United States.

Amendment 10.

State only can regulate.

Art. 1, S. 8. 18.

Section 37—falls, under the same criticism, as Sec. 35: If the claim of the United States upon this spirit, has been extinguished, it has no farther right to control the times or manner in which it shall be taken from shops, or tavern cellars, where it may be stored; these are police regulations and are controlled by the State.

Again: If this Section was valid, its penalty is bad, in this, that it amerces a man not according to his fault, and saves not to him his contenement or wainage.

Of these amercements I speak more at large, in considering the right of men, as ascertained by Magna Charta and the English and Colonial Authorities.

(Amendment 10; Art. 1, S. 8, 18.)

Amendments 8.9

SEC. 38. *And be it further enacted*, That any person who shall add or cause to be added any ingredient or substance to any distilled spirits, before the tax imposed by law shall have been paid thereon, for the purpose of creating a fictitious proof, shall, on conviction, be fined not less than one hundred dollars nor more than one thousand dollars for each cask or package so adulterated, and imprisoned not less than three months nor more than two years, and every such cask or package, with its contents, shall be forfeited to the United States.

SEC. 39. *And be it further enacted*, That any person who shall evade or attempt to evade the payment of the tax on any distilled spirits, in any manner whatever, shall forfeit and pay double the amount of the tax so evaded or attempted to be evaded; and any person who shall change or alter any stamp, mark, or brand on any cask or package containing distilled spirits, or who shall put into any cask or package spirits of greater strength than is indicated by the inspection mark thereon, or who shall fraudulently use any cask or package having any inspection mark or stamp thereon, for the purpose of selling other spirits or spirits of quantity or quality different from the spirits previously inspected therein, shall forfeit and pay the sum of two hundred dollars for every cask or package on which the stamp or mark is so changed or altered or which is so fraudulently used, and, on conviction, shall be fined for each such offense not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than one month nor more than one year.

Sections 38 and 39 cannot altogether be passed; but I

will defer comment, and consider, hereafter, the general subject of forfeiture.

(Art. 1, S. 8, 18; Amendments 8 and 9.)

SEC. 40. *And be it further enacted*, That any person who shall knowingly use any false weights or measures in ascertaining, weighing, or measuring the quantities of grain, meal, or vegetable materials, molasses, beer, or other substances to be used for distillation, or who shall destroy, break, injure, or tamper with any lock or seal which may be placed on any cistern room or building, by the duly authorized officers of the revenue, or shall open said lock or seal, or the door to such cistern room or building, or shall in any manner gain access to the contents therein in the absence of the proper officer, shall, on conviction, be fined not less than five hundred dollars, nor more than five thousand dollars, and imprisoned not less than one year nor more than three years; and any person who shall use any molasses, beer, or other substance, whether fermented on the premises or elsewhere, for the purpose of producing spirits, before an account for the same shall have been registered in the proper record book provided for that purpose, shall forfeit and pay the sum of one thousand dollars for each and every offense so committed.

State only can punish. Amendt 10.

Amendts 5. 8. 9.

Art. 1, S. 8. 18

Section 40, 1st: Contains another police regulation.

2d: If the officers of the Revenue were not duly authorized to place locks and seals on a man's property, he has a right to break them and the Section fails.

(Amendments 10, 5, 9, 8; Art. 1, S. 8, 18.)

Amendments 4. 5. 6. 7. 9.

SEC. 41. *And be it further enacted*, That it shall be lawful for any internal revenue officer to detain any cask or package containing or supposed to contain, distilled spirits, when such officer has reason to believe the tax imposed by law upon the same has not been paid, or that the same is being removed in violation of law; and every such cask or package may be held by such officer at a safe place until it shall be determined whether the property so detained is liable by law to be proceded against for forfeiture; but such summary detention shall not continue in any case longer than forty-eight hours, without process of law or intervention of the officer to whom such detention is to be reported.

Section 41—a warrant to seize the packages supposed to contain spirits, without an oath, showing, not only supposition, but also reasonable grounds of suspicion. Is the Bailiff greater than the Court—the servant than his master?

(Amendments 4, 5, 6, 7& 9; Art. 1, S. 8, 18.)

Amendments 5. 4. 9.

SEC. 42. *And be it further enacted*, That no distillery nor distilling apparatus seized for any violation of law shall be released to the claimant or any intervening party before judgment, except in case of a distillery for which the special tax has been paid, and which has a registered producing capacity of one hundred and fifty proof gallons, or more, per day, on showing by sufficient affidavits that there are hogs or other live stock, not less than fifty head in number, depending for their feed on the products of said distillery which would suffer injury if the business of such

distillery is stopped; such distillery in that case may be released to the claimant, or any other intervening party, at the discretion of the court, on a bond to be given and approved in open court with two or more sureties for the full appraised value of all the property seized, which value shall be ascertained by three competent appraisers to be designated and appointed by the court. In case of the seizure of and judgment of forfeiture against any distillery used or fit for use in the production of distilled spirits having a registered producing capacity of less than one hundred and fifty gallons per day, or of any distillery for the non-payment of the special tax, the still, stills, doubler, worm, worm tub, and all mash tubs and fermenting tubs shall be so destroyed as to prevent the use of the same or any part thereof for the purpose of distilling; and the materials shall be sold as in case of other forfeited property.

This power is not granted in Art. 1, S. 1.

Art. 1, S. 8. 18.

Section 42. No distillery or distilling apparatus (though seized in wrong, and without warrant) shall be released before judgment.

The last clause is at least singular; the poor man, who cannot buy a large still, must not only furnish heavy bonds, but, in case his distillery is adjudged forfeited, it shall be destroyed. This would make an unpleasant state of affairs, if the judgment of forfeiture was reversed for error.

This amercement extends to the livelihood and freehold. It is purely a criminal proceeding,—is not an exercise of the taxing power, in the most distant sense; for, what it takes, does not go to support the State, but is destroyed. (See Section 116 of this Argument, *post.*)

(Amendments 4, 5, 9; Art. 1. S. 1; Art. 1, S. 8, 18).

SEC. 43. *And be it further enacted*, That it shall be the duty of every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand, or stamp required by law, at the time of emptying such cask or package, to efface and obliterate said mark, stamp or brand. Any such cask or package from which said mark, brand, and stamp is not so effaced and obliterated, as herein required, shall be forfeited to the United States, and may be seized by any officer of internal revenue wherever found. Any railroad company or other transportation company, or person, who shall receive or transport, or have in possession with intent to transport, or with intent to cause or procure to be transported, any such empty cask or package, or any part thereof, having thereon any brand, mark, or stamp required by law to be placed on any cask or package containing distilled spirits, shall forfeit three hundred dollars for each such cask or package, or any part thereof, so received or transported, or had in possession with the intent aforesaid; and any boat, railroad car, cart, dray, wagon, or other vehicle, and all horses or other animals used in carrying or transporting the same, shall be forfeited to the United States. Any person who shall fail or neglect to efface and obliterate said mark, stamp, or brand, at the time of emptying such cask or package, or who shall receive any such cask or package, or any part thereof, with the intent aforesaid, or who shall transport the same, or knowingly aid or assist therein, or who shall remove any stamp provided by this act from any cask or package containing or which had contained distilled spirits, without defacing and destroying the same at the time of such removal, or who shall aid or assist therein, or who shall have in his possession any such

stamp so removed as aforesaid, or have in his possession any cancelled stamp or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits, shall be deemed guilty of a felony, and, on conviction, shall be fined not less than five hundred dollars nor more than ten thousand dollars, and imprisoned not less than one year nor more than five years.

8. 9.

Section 43 fails, if the right to require the casks to be stamped or branded, has failed.

And if not; the fine is excessive, and amercement covers exempt property.

The last clause makes slight negligence a felony, and, in addition to an excessive fine, inflicts a cruel and unusual punishment on the person, by blasting his good name and branding him as a felon.

(Art. 1, S. 8, 18; Amendments 4, 5, 8, 9.)

SEC. 44. *And be it further enacted*, That any person who shall carry on the business of a distiller, rectifier, compounder of liquors, wholesale liquor dealer, retail liquor dealer, or manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller, with intent to defraud the United States of a tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits or for the compound-

amendments 4. 5. 6. 8. 9.

ing of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in the store or other place of business of the compounder, or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises; and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress, to and from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Art. I, S. 8. 18.

Section 44 presents a novelty in criminal jurisprudence in this country.

In Britain and on the Continent, some centuries since, men were punished on the charge of imagining the death of the King; but in America there is no precedent for making a mere opinion or intention, unaccompanied with any action towards carrying it into effect, a crime, or inflicting punishment, unless we seek it in *religious persecution*, or in the horrible excesses of absolute ownership in men.

An officer seizes the distillery, or rectifying establish-

ment, and the spirits therein, on suspicion, without warrant; they cannot be released until judgment (Sec. 42); the burden of proof is on the defendant to show that no fraud has been committed (Sec. 36); intent is fraud (Sec. 44). He cannot disprove intent but by his own oath;—his oath cannot be taken in his favor, in a criminal prosecution; therefore,—seizure is conviction.

The picture may be a little overdrawn, and strict construction of the statute may save from such an outrage; yet, the escape is narrow,—and the tendency of the statute developed.

Under a strict construction, intent would be difficult to prove, and impossible to disprove; and punishing bare intent, is sufficiently outrageous.

Again: The amercement extends to the freehold and means of livelihood,—is not after the greatness of the fault, but is dependent on entirely different conditions; and the punishment is excessive.

(Art. 1, S. 8, 18; Amendments 4, 5, 6, 8, 9.)

SEC. 45. *And be it further enacted*, That every rectifier, wholesale liquor dealer, and compounder of liquors shall provide himself with a book to be prepared and kept in such form as shall be prescribed by the Commissioner of Internal Revenue, and shall, on the same day on which he receives any spirits, and before he shall draw off any part thereof, or add water or anything thereto, or in any respect alter the same, enter into such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence the spirits were received, by whom distilled, rectified or compounded, and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the

amendmts 4. 5 — Art. 1, S. 1.

amendmt 5.

kind of spirit, and the number and kind of adhesive stamps thereon; and every such rectifier, compounder, and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same shall be removed from his premises, enter, in like manner, in the said book, the day when, and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and the kind or quality of such spirits, and also the number of gallons and fractions of a gallon at proof; and if in the original packages in which they were received, he shall enter the name of the distiller and the serial number of the package. And every such book shall be at all times kept in some public or open place on the premises of the rectifier, wholesale dealer, or compounder of liquors, respectively, for inspection; and any revenue officer may make an examination of such book and take an abstract therefrom; and every such book, when it has been filled up as aforesaid, shall be preserved by such rectifier, wholesale liquor dealer, or compounder of liquors, for a period not less than two years; and during such time it shall be produced by him to every revenue officer demanding the same; and if any rectifier, wholesale dealer, or compounder of liquors shall refuse or neglect to provide such book or to make entries therein as aforesaid, or shall cancel, alter, obliterate, or destroy any part of such book, or any entry therein, or make any false entry therein, or hinder or obstruct any revenue officer from examining such book or making an entry therein, or taking any abstract therefrom; or if such book shall not be preserved or not produced by any rectifier, or wholesale dealer, or compounder, as hereinbefore directed, he shall pay a penalty of one hundred dollars, and, on conviction, shall be fined not less than one hundred dollars nor more than

Amendments 4. 6. 5. 9.

Amendmt 8.

five thousand dollars, and imprisoned not l
months nor more than three years.

Section 45—Adds to the subjects on whic
sioner may legislate:

Adds another command to acquire propert
another trade to inquisition and publication
the same condemnation with Section 19.

(Amendments 9, 5, 4, 6, 8; Art. 1, S. 1; A

SEC. 46. *And be it further enacted*, That it
lawful for any rectifier of distilled spirits, co
liquors, liquor dealer, wholesale or retail liqu
purchase or receive any distilled spirits i
greater than twenty gallons from any perso
an authorized rectifier of distilled spirits, co
liquors, distiller, or wholesale liquor dealer.
violating this section shall forfeit and pay o
dollars: *Provided*, That this shall not be held
judicial sales, nor to sales at public auction
auctioneer who has paid a special tax as such.

Section 46—cripples the right to acquire pro
man may buy a barrel of highwines, on which
States has no claim, from any other man; but
fier, however great his need, or however beneficial the transaction, must be restricted of his liberty in this particular. Again I ask, does the power to tax, include the power to forbid production, or the power to tax the exercise of a business, include a power to regulate or limit it—or forbid any portion altogether?

(Preamble; Art. 1, S. 8, 18; Amendments 8 & 9).

kind of spirit, and the number and kind of adhesive stamps thereon; and every such rectifier, compounder, and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same shall be removed from his premises, enter, in like manner, in the said book, the day when, and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and the kind or quality of such spirits, and also the number of gallons and fractions of a gallon at proof; and if in the original packages in which they were received, he shall enter the name of the distiller and the serial number of the package. And every such book shall be at all times kept in some public or open place on the premises of the rectifier, wholesale dealer, or compounder of liquors, respectively, for inspection; and any revenue officer may make an examination of such book and take an abstract therefrom; and every such book, when it has been filled up as aforesaid, shall be preserved by such rectifier, wholesale liquor dealer, or compounder of liquors, for a period not less than two years; and during such time it shall be produced by him to every revenue officer demanding the same; and if any rectifier, wholesale dealer, or compounder of liquors shall refuse or neglect to provide such book or to make entries therein as aforesaid, or shall cancel, alter, obliterate, or destroy any part of such book, or any entry therein, or make any false entry therein, or hinder or obstruct any revenue officer from examining such book or making an entry therein, or taking any abstract therefrom; or if such book shall not be preserved or not produced by any rectifier, or wholesale dealer, or compounder, as hereinbefore directed, he shall pay a penalty of one hundred dollars, and, on conviction, shall be fined not less than one hundred dollars nor more than

Amendments 4. 6. 5. 9.

Amendment 8.

five thousand dollars, and imprisoned not less than three months nor more than three years.

Section 45—Adds to the subjects on which the Commissioner may legislate:

Adds another command to acquire property: Lays open another trade to inquisition and publication: Falls under the same condemnation with Section 19.

(Amendments 9, 5, 4, 6, 8; Art. 1, S. 1; Art. 1, S. 8, 18).

Amendmt 9.

Preamble

Amendmt 8

SEC. 46. *And be it further enacted*, That it shall not be lawful for any rectifier of distilled spirits, compounder of liquors, liquor dealer, wholesale or retail liquor dealer, to purchase or receive any distilled spirits in quantities greater than twenty gallons from any person other than an authorized rectifier of distilled spirits, compounder of liquors, distiller, or wholesale liquor dealer. Any person violating this section shall forfeit and pay one thousand dollars: *Provided*, That this shall not be held to apply to judicial sales, nor to sales at public auction made by an auctioneer who has paid a special tax as such.

Section 46—cripples the right to acquire property: Any man may buy a barrel of highwines, on which the United States has no claim, from any other man; but the rectifier, however great his need, or however beneficial the transaction, must be restricted of his liberty in this particular. Again I ask, does the power to tax, include the power to forbid production, or the power to tax the exercise of a business, include a power to regulate or limit it—or forbid any portion altogether?

(Preamble; Art. 1, S. 8, 18; Amendments 8 & 9).

Amend^mt 9.

SEC. 47. *And be it further enacted*, That all distilled spirits drawn from any cask or other package and placed in any other cask or package containing not less than ten gallons, and intended for sale, shall be again inspected and gauged, and the cask or package into which it is so transferred shall be marked or branded, and such marking and branding shall distinctly indicate the name of the gauger, the time and place of inspection, the proof of the spirits, the particular name of such spirits as known to the trade, together with the name and place of business of the dealer, rectifier, or compounder, as the case may be; and in all cases, except where such spirits have been rectified or compounded, the name also of the distiller, and the distillery where such spirits were produced, and the serial number of the original package; and the absence of such mark or brand shall be taken and held as sufficient cause and evidence for the forfeiture of such unmarked packages of spirits.

Art. 3, s. 2. Amendm^t 6

Sec. 47. If the tax has been paid, or tendered, on the spirit, and it is free, and if no tax or charge or right in the cask has ever accrued to the Government, what right has it to interfere? Or, by what right, on what consideration, can it take the property of a citizen, on which its claims have been satisfied?

(Art. 1, S. 8. 1 & 18; Art. 3, S. 2, 3; Amendment 6 and 9).

SEC. 49. *And be it further enacted*, That the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, may appoint not exceeding twenty-five officers, to be called supervisors of internal revenue, each one of whom shall be assigned to a desig-

nated territorial district to be composed of one or more judicial districts and territories, and shall keep his office at some convenient place in his district to be designated by the Commissioner, and shall receive in addition to expenses necessarily incurred by him and allowed and certified by the said Commissioner as a compensation for his services, such salary as the Commissioner of Internal Revenue may deem just and reasonable, not exceeding three thousand dollars per annum. It shall be the duty of every supervisor of internal revenue, under the direction of the Commissioner, to see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with; to aid in the prevention, detection, and punishment of any frauds in relation thereto, and to examine into the efficiency and conduct of all officers of internal revenue within his district; and for such purposes he shall have power to examine all persons, books, papers, accounts, and premises, and to administer oaths and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel a compliance with such summons in the same manner as assessors may do. It shall be the duty of every supervisor of internal revenue as aforesaid to report in writing to the Commissioner of Internal Revenue any neglect of duty, incompetency, delinquency, or malfeasance in office of any internal revenue officer within his district of which he may obtain knowledge, with a statement of all the facts in each case, and any evidence sustaining the same; and he shall have power to transfer any inspector, guager, or storekeeper from one distillery or other place of duty to another, or from one collection district to another, within his district, and may, by notice in writing, suspend from duty any such inspector, gauger, or storekeeper, and in

Art. 2, s. 1. 3.

— Art. 1, s. 1.

Art. 3, s. 1. 3.

Amendmts 4. 5. 6. 7. 9.

Art. 2, s. 1. 3

case of suspension shall immediately notify the collector of the proper district and the Commissioner of Internal Revenue, and within three days thereafter make report of his action, and his reasons therefor, in writing, to said Commissioner, who shall thereupon take such further action as he may deem proper.

Art. 2, s. 1. 3.

SEC. 50. *And be it further enacted*, That the Commissioner of Internal Revenue shall have power, whenever in his judgment the necessities of the service may require, to employ competent detectives, not exceeding twenty-five in number at any one time, to be paid under the provisions of the seventh section of the "Act to amend existing laws relating to internal revenue, and for other purposes," approved March 2. 1867, and he may, at his discretion, assign any such detective to duty under the direction of any supervisor of internal revenue, or to such other special duty as he may deem necessary, and that from and after the passage of this act no general or special agent, or inspector, by whatever name or designation he may be known, of the Treasury Department in connection with the internal revenue, except inspectors of tobacco, snuff, and cigars, and except as provided for in this act, shall be appointed, commissioned, employed, or continued in office, and the term of office or employment of all such general or special agents or inspectors now authorized as aforesaid under employment at the time of the passage of this act shall expire ten days after this act shall take effect.

" " "

SEC 51. *And be it further enacted*, That from and after the passage of this act no assessor or collector shall be detailed or authorized to discharge any duty imposed by law on any other collector or assessor, but a supervisor of internal revenue may, within his territorial district, suspend any collector or assessor for fraud, or gross neglect of duty,

or abuse of power, and shall immediately report this action to the Commissioner of Internal Revenue, with his reasons therefor in writing, who shall thereupon take such further action as he may deem proper.

Section 49. "All legislative powers are vested in Con- "gress." (Const. Art. 1, S. 1.) "The executive power "shall be vested in a President." (Art. 2, S. 1.) "He shall "take care that the laws be faithfully executed and shall "commission all the officers of the United States." (S. 4.) "He shall nominate and, by and with the consent of "the Senate, shall appoint all officers whose appointments "are not herein otherwise provided for, and which shall "be established by law." (S. 2.)

1st. It is the duty of the President to see that the laws are faithfully executed. Executive powers were not given to Congress and they cannot delegate them; neither can they require any such officer to act under the direction of the Commissioner or any other than the Executive of the Government, who is amenable to impeachment if he fails to see to the execution of the law. He alone can commission them.

2d. The Supervisors have a judicial office with a roving Commission to aid in prevention and punishment. They may examine all persons, books, papers, and premises; may administer oaths, and summon any person to produce books and paper, as well as to testify;—for cause, or without, in secret, and without counsel, a person, suspected or obnoxious, is forced to attend and answer this inquisition.

MARK: I use this term from knowledge: Called by peremptory summons:

STATE OF ILLINOIS, } ss.
COOK COUNTY, }

EDWARD ROBY, ESQ.—You are hereby commanded to appear before the undersigned, Supervisor of Internal Revenue for Illinois, forthwith, at the office of GENL. WEBSTER, No. 14 Lomdard Block, Chicago, Ill., the truth to testify concerning any and all matters now pending before me.

Dated this 12th day of August, 1869.

IRA J. BLOOMFIELD,
Supervisor of Int. Rev. for Illinois.

I was taken into a dark inner chamber, the only occupant of which was presented as a detective from St. Louis; the door closed, and an examination by the supervisor and the detective, into my private affairs, commenced. General Bloomfield is, I believe, an honest and conscientious man, yet this is the summons he uses, and I have heard the Circuit Court at Chicago intimate that it would enforce his summons. I submitted because, I wished the experience to relate from knowledge.

Upon his own knowledge, or on an *ex parte* trial, he may punish by suspension any inspector, guager, or storekeeper, and, reporting the cause to the Commissioner, with the *ex-parte* evidence, this suspension of an officer of the United States by an irresponsible official, becomes absolute.

A precedent for this system—established by this Section and by Sections 50 and 51—appears in the Police espionage of France, a century since, as far as we are informed of the workings of that engine of tyranny: the Commissioner is the Prefect, the Supervisors are sub-prefects; the detectives, the secret agents, and the storekeepers, guagers and inspectors, are the force, or common rank;—all are to

scan each action of the life of every person amenable to this law, and report to the central office, which secretly selects its victims, issues its edicts, confines the liberty of action, or, seizing the person or property, entails financial ruin and disgrace upon its victims.

In practice, how often this office robs justice of its due. This Court cannot be ignorant of common fame: Men are arrested, and their property seized; the Commissioner compromises with them. Either they were criminals, or they were not. If they were, compromise compounds a crime, and makes the sanction of the law an act of barter. Courts are robbed of their jurisdiction, and men are tried by an inquisitor, and fined without indictment. If they are not criminals, gross wrong is done, and the innocent compelled to purchase justice.

A precedent for this appears in the practice of Henry VII (A. D. 1503). Hume's Hist. of England (Harper's Ed.) Vol. 3, pp. 61, 62, 63: Empson and Dudley, on a roving commission, "at first gave indictments to those "whom they intended to oppress, upon which the persons "were committed to prison, but never brought to trial, "and were at length obliged, in order to recover their lib- "erty, to pay heavy fines and ransoms, which were called "mitigations and compositions. By degrees the very ap- "pearance of law was neglected; the two ministers sent "forth their precepts to attach men, and summon them "before themselves in their private houses, in a Court of "Commission, where without trial or jury, arbitrary de- "crees were issued.—But the chief means of oppression "employed by these ministers were the penal statutes; "* * * spies, informers and inquisitors were rewar- "ded and encouraged in every part of the Kingdom."

And to the whole system, inaugurated by this Act, we

can apply a remark made upon the criminal prosecutions in the time of Henry VIII: "there are two things worthy of observation:

"1st, the slight facts which were considered as proofs of "a charge;

"2nd, the slight evidence which was allowed to estab- "lish those facts; an observation which may be made "as well upon proceedings at Common Law, as upon "the more decisive way of condemning persons by Parlia- "ment."

4 Reeve's English Law, p. 407.

Again, in the same reign it was enacted, "that the "King's proclamations should have the force of laws."

(31 Henry VIII., 63.)

Afterwards it was enacted "that any nine counsellors "should form a legal court, for punishing disobedience to "proclamations."

(34 Henry VIII. C. 23.) (4 Reeves, p. 402.)

(Art. 2, S. 1 & 3; Art. 3, S. 1 & 3; Art. 1, S. 1; Art. 1, S. 8, 18.)

Amendments 4. 5. 9.

SEC. 52. *And be it further enacted*, That there shall be appointed by the Secretary of the Treasury such numbers of internal revenue storekeepers as may be necessary, the compensation of each of whom shall be determined by the Commissioner of Internal Revenue, not exceeding five dollars per day, to be paid by the United States, one or more of whom shall be assigned by the Commissioner of Internal Revenue to every bonded or distillery warehouse established by law; and no such storekeeper shall be engaged in any other business while in the service of the United States without the written permission of the Commissioner of Internal Revenue. Every storekeeper shall

take an oath faithfully to perform the duties of his office, and shall give a bond, to be approved by the Commissioner of Internal Revenue, for the faithful discharge of his duties, in such form and for such amount as the Commissioner may prescribe. Every storekeeper shall have charge of the warehouse to which he may be assigned, under the direction of the collector controlling the same, which warehouse shall be in the joint custody of such storekeeper and the proprietor thereof, and kept securely locked, and shall at no time be unlocked and opened, or remain open, unless in the presence of such storekeeper or other person who may be designated to act for him as hereinafter provided; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse. Every storekeeper shall keep a warehouse book, which shall at all times be open to the examination of any revenue officer, in which he shall enter an account of all articles deposited in the warehouse to which he is assigned, indicating in each case the date of the deposit, by whom manufactured or produced, the number and description of the packages and contents, the quantities therein, the marks and serial numbers thereon, and by whom gauged, inspected, or weighed, and if distilled spirits, the number of gauge or wine gallons and of proof gallons; and before delivering any article from the warehouse he shall enter in said book the date of the permit or order of the collector for the delivery of such articles, the number and description of the packages, the marks, and serial numbers thereon, the date of delivery, to whom delivered, and for what purpose, which purpose shall be specified in the permit or order for delivery; and in case of delivery of any distilled spirits the number of

the gauge or wine gallons, and of proof gallons, shall also be stated; and such further particulars shall be entered in the warehouse books as may be prescribed or found necessary for the identification of the packages, to insure the correct delivery thereof and proper accountability *thereof* [therefor]. A daily return shall be furnished by every storekeeper to the collector of the district of all articles received in and delivered from the warehouse during the day preceding that on which the return is made, a copy of which shall be mailed by him at the same time to the Commissioner of Internal Revenue; and each storekeeper shall, on the first Monday of every month, make a report in triplicate of the number of packages of all articles, with the several descriptions thereof respectively, as above provided, which remained in the warehouse at the date of his last report, and of all articles received therein and delivered therefrom during the preceding month, and of all articles remaining therein at the end of said month; one of which reports shall be by him delivered to the assessor of the district, to be recorded and filed in his office; one delivered to the collector having control of the warehouse, to be recorded and filed in his office; and one transmitted to the Commissioner of Internal Revenue, to be recorded and filed at his office. Any internal revenue storekeeper may be transferred by the supervisor of the district or by the Commissioner of Internal Revenue from one warehouse to any other. In case of the absence of any internal revenue storekeeper by sickness or from any other cause, the collector having control of the warehouse may designate a person to have temporary charge of such warehouse, who shall during such absence, perform the duties and receive the pay of the storekeeper for the time he may be so employed; and for any violation of the law

he shall be subject to the same punishment as storekeepers. Any storekeeper or other person in the employment of the United States, having charge of a bonded warehouse, who shall remove or allow to be removed any cask or other package therefrom without an order or permit of the collector, or which has not been marked or stamped in the manner required by law, or shall remove or allow to be removed any part of the contents of any cask or package deposited therein, shall be immediately dismissed from office or employment, and, on conviction, be fined not less than five hundred dollars nor more than two thousand dollars, and imprisoned not less than three months nor more than two years.

amendm't 8.

Even in the time of Henry VIII., the courts checked arbitrary power. 4 Reeve's, 403.

Section 52 fails with Section 15.

(Art. 1, S. 8, 18; Amendments 4, 5, 8, 9.)

Sec. 53. *And be it further enacted*, That there shall be appointed by the Secretary of the Treasury, in every collection district where the same may be necessary, one or more internal revenue guagers, who shall each take an oath faithfully to perform his duties, and shall give his bond, with one or more sureties satisfactory to the Commissioner of Internal Revenue, for the faithful discharge of the duties assigned to him by law or regulations; and the penal sum of said bond shall not be less than five thousand dollars, and said bond shall be renewed or strengthened as the Commissioner of Internal Revenue may require. The duties of every such gauger shall be performed under the supervision and direction of the collector of the district to which he may be assigned, or of the

collector in charge of exports at any port of entry to which he may be assigned. Fees for gauging and inspecting shall be prescribed by the Commissioner of Internal Revenue, to be paid to the collector by the owner or producer of the articles to be gauged and inspected; and said collector shall retain all amounts so received as such fees until the last day of each month, when the aggregate amount of fees so paid that month shall, under regulation to be prescribed by the Commissioner of Internal Revenue, be paid to the gauger or gaugers performing the duty. In no case, however, shall the aggregate monthly fees of any gauger exceed the rate of three thousand dollars per annum. All necessary labor and expense attending the gauging of any article shall be borne by the owner or producer of such articles. Every gauger shall, under such regulations as may be prescribed by the Commissioner of Internal Revenue, make a daily return, in duplicate; one to be delivered to the assessor and the other to the collector of his district, giving a true account, in detail, of all articles gauged and proved or inspected by him, and for whom, and the number and kind of stamps used by him. Any gauger who shall make any false or fraudulent inspection, gauging, or proof, shall pay a penalty of one thousand dollars, and, on conviction shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

Section 53—Adds to the army of inquisitors — officers appointed by a secretary,—and legislation as to fees and other matters, by the Commissioner.

(Art. 1, S. 1; Art. 1, S. 8, 18.)

SEC. 54. *And be it further enacted*, That a drawback shall be allowed upon alcohol and rum exported to foreign countries on which taxes have been paid under the provisions of this act when exported as herein provided for. The drawback allowed shall include the taxes levied and paid upon the alcohol or rum exported, not, however, exceeding sixty cents per gallon proof spirits, which shall be due and payable only after the proper entries and bonds have been executed and filed and all other conditions complied with as hereinafter required, and thirty days after the vessel has actually cleared and sailed on her voyage with such spirits on board; and the Secretary of the Treasury shall prescribe such rules and regulations in relation thereto as may be necessary to secure the treasury of the United States against frauds. And if any person shall fraudulently claim or seek to obtain an allowance or drawback on any alcohol or rum, or shall fraudulently claim any greater allowance or drawback than the tax actually paid thereon, such person shall forfeit and pay to the government of the United States triple the amount wrongfully and fraudulently sought to be obtained, and, on conviction, shall be imprisoned not less than one year nor more than ten years. And any owner, agent, or master of any vessel who shall knowingly aid or abet in the fraudulent collection or fraudulent attempt to collect any drawback upon rum or alcohol, or shall knowingly aid or permit any fraudulent change in the spirits so shipped, shall, on conviction, be fined five thousand dollars and imprisoned not less than one year, and the ship or vessel on board of which such shipment was made, or pretended to be made, shall be forfeited to the United States, whether a conviction of the master or owner be had or otherwise, and proceeding may be had in admiralty by libel for such forfeiture.

Section 54—goes into admirality, out of the jurisdiction of *lex terræ*. I will not discuss its provisions further than in the examination and distinction between *lex terræ* and *lex maris*.

Sec. 56. *And be it further enacted*, That all distilled spirits, in any bonded warehouse, shall within nine months after the passage of this act be withdrawn from such warehouse, and the taxes paid on the same; and the casks or packages containing said spirits shall be marked and stamped and be subject in all respects to the same requirements as if manufactured after the passage of this act. And any distilled spirits, remaining in any bonded warehouse for a period of more than nine months after the passage of this act shall be forfeited to the United States, and shall be sold or disposed of for the benefit of the same, in such manner as shall be prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury. And whenever, in the opinion of the Commissioner of Internal Revenue any distillery or other warehouse shall become unsafe or unfit for use, or the merchandise therein shall for any reason be liable to loss or great wastage, the Commissioner may discontinue such warehouse, and require that the merchandise therein shall be transferred to such other warehouse as may be designated by him within such time as he shall prescribe. Such transfer shall be made under the supervision of the collector or such other officer as may be designated by the commissioner; and the expense thereof, shall be paid by the owner of the merchandise; and if the owner of such merchandise shall fail to make such transfer within the time prescribed, or to pay the just and proper expense of such transfer, as ascertained and

Amendm^ts 4. 5. 6. 8. 9.

determined by the commissioner, such merchandise may be seized and sold by the collector, in the same manner as goods are sold upon distraint for taxes, and the proceeds of such sale shall be applied to the payment of the taxes due thereon and the costs and expenses of such sale and removal, and the balance paid over to the owner of such merchandize.

Section 56. Under a power to tax, the United States cannot take the whole. At the end of nine months, and not before, it may sell, under this Act, so much, and only so much of the property of the distiller, in warehouse or out of it, as shall be sufficient to pay the tax; and the debt being thereby extinguished, the balance of the pledge is free.

(Art. 1, S. 8, 1and 18; Amendments 4, 5, 6, 8 and 9.)

Sections 57 and 58—do not affect us.

Section 59,—Lays an excise, authorized by the Constitution.

Art. 3, S. 1. 2. Amendmts 5. 6. 9.

SEC. 102. *And be it further enacted*, That in all cases arising under the internal revenue laws, where, instead of commencing or proceeding with a suit in court, it may appear to the Commissioner of Internal Revenue to be for the interest of the United States to compromise the same, he is empowered and authorized to make such compromise with the advice and consent of the Secretary of the Treasury; and in every case where a compromise is made there shall be placed on file in the office of the Commissioner the opinion of the solicitor of internal revenue, or officer acting as such, with his reasons therefor, together with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neg-

lect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise; but no such compromise shall be made of any case after a suit or proceeding in court has been commenced, without the recommendation also of the Attorney General: *Provided*, That it shall be lawful for the court at any stage of such suit or criminal proceedings to continue the same for good cause shown on motion of the district attorney.

Section 102 forms a part of the "res gestæ;" and, with Section 49, &c., it completes the resemblance to the precedents cited.

History has stamped the government of Henry VII. with infamy, because, through its ministers, it prostituted the forms of justice,—commencing prosecutions merely to extort money, and turned the course of penal law, from its high vocation of protecting the people and of reforming the guilty, to a base and sordid pretext for extorting money from the miserable culprit.

Makers of dictionaries give a definition to the word "rapine," which describes such courses; and from Lord Coke's time to the present, they have been branded as most horrible oppressions and tyranny.

In elegant phrase: Section 102 fails to conceal the mercenary character of the Act, or, the reasons for these ruinous amercements, excessive fines, and cruel penalties. Nay, they make patent what before was concealed; and the hideous deformities of medieval despotism appear, exorcised from their sleep of centuries, when the special Court of inquisition is authorized to compound the crime and sell indulgence, when thereby the prosecuting Government shall obtain more money than it would from the tax and penalty.

Vox populi, vox dei, when the people have carefully thought upon the utterance,—yet here, how strangely have their best desires for good misled!

The good caught a saying of Napoleon that "the vices of men were the best sources of revenue; strong drink and "tobacco would pay more than all the virtues combined."

Temperance men echoed: "tax it out of existence, "and benefit mankind!" Those who honestly sought to supply the need and faith of the government, thought an immense amount could be obtained without injustice; patriots and statesmen saw, in their hasty glance, but the vices contained in these articles, and, in the revenue therefrom, only relief to virtuous industry;—but, the weight of the imposition defeated itself,—and they, exasperated at being foiled, sought out a most cunning plan to attain success. Patriots, religionists, temperance men, pushed it forward, and nursed a viper in their arms; and it is said that crafty men also took advantage of the popular hallucination; men, seeking power, or angry at having been foiled, framed its passages of oppression; and golden arguments towards the indifferent, were used by those who enriched themselves, by speculations on its passage, to the amount of twenty millions.

A precedent to this, also, is found. Milton tells of sin "that seemed a woman to the waist, and fair; yet ended "foul, in many a scaly fold, voluminous and vast, while "'bout her middle round, a cry of hell-hounds, never ceas-"ing, barked, and crept, if aught disturbed their noise, "into her womb, and kennelled there, yet there still "barked, within, unseen."

(Art. 3, S. 1 and 2; Amendments 5, 6, 9; Art. 1, S. 8, 18.)

Section 105—Continues liens, fines, and penalties, unwarranted except against the guilty and his own.
(Amendments 4, 5, 6, 8, 9; Art. 1, S. 8, 18.)

Amendmts 4.5.6.8.9.

SEC. 106. *And be it further enacted*, That in any case where there has been a refusal or neglect to pay any tax imposed by the internal revenue laws, and where it is lawful and has become necessary to seize and sell real estate to satisfy the tax, the Commissioner of Internal Revenue may, if he deems it expedient, direct that a bill in chancery be filed, in a district or circuit court of the United States to enforce the lien of the United States for tax upon any real estate or to subject any real estate owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax. And all persons having liens upon the real estate sought to be subjected to the payment of any tax as aforesaid, or claiming any ownership or interest therein, shall be made parties to such proceedings, and shall be brought into court as provided in other suits in chancery in said courts. And the said courts shall have, and are hereby given, jurisdiction in all such cases, and shall at the term next after such time as the parties shall be duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjucate all matters involved therein, and to pass upon and finally determine the merits of all claims to and liens upon the real estate in question, and shall, in all cases where a claim or interest of the United States therein shall be established, decree a sale, by the proper officer of the court, of such real estate, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

Section 106 authorizes proceedings, to which only the guilty owner of the real estate can be subjected. The Commissioner prefers a distress warrant, and snaps his fingers at the Courts, denying their power to hinder him.

(Amendments 4, 5, 6, 8, 9; Art. 1, S. 8, 1 and 18.)

And, of the act of March 31st, 1868, Section 5 lays penalties and forfeitures, contrary to law.

(Amendments 4, 5, 6, 8, 9; Art. 1, S. 8, 18.)

Sec. 5. *And be it further enacted*, That every person engaged in carrying on the business of a distiller who shall defraud or attempt to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

Amendmts 4. 5. 6. 8. 9.

Sec. 7. *And be it further enacted*, That no compromise, or discontinuance, or nolle prosequi of any prosecution under this act shall be allowed without the permission in writing of the Secretary of the Treasury and the Attorney General.

Art. 3, S. 1. 2. Art. 6. 2. Amendmts 9. 10.

Section 7 is void, also.

A *nolle prosequi* is essentially a judicial act, which can only be performed by the judicial members of the Court.

State v. *Flemming*, 7 Hump., 152.

See also *Du Chastellux* v. *Fairchild*, 15 Pa., 18.
Ervine's Appeal, 16 Pa., 256.
Young v. *The State Bank*, 4 Ind., 301.

The entry of a *nolle prosequi*, can only be performed by the judge and the prosecuting attorney of the Court;—the Attorney General of the United States, and the Secretary of the Treasury, form no part of the circuit or district Courts; which consist of judges, clerk, district attorney and marshal.

There are many cases where a prisoner is entitled to ave a *nolle prosequi* entered, as, where all the witnesses gainst him shall have died, or another shall have been onvicted by eye witnesses of a crime, for which the risoner was indicted on circumstantial evidence merely. f the legislature divests the Court of its authority to de- ide when the prisoner is entitled to his liberty, and places he judicial powers under the surveillance and control of he Attorney General and Secretary of the Treasury, the risoner may be kept in prison, days, and perhaps weeks, efore the written authority can be obtained; for, these per- ons can be in but one district at a time; and, mean- while, though the process may have been good at first, s the prisoner has become entitled to his liberty, it has ost its virtue, and he falsely imprisoned without due pro- ess of law.

These sections form a part of this grand scheme, and larken even the pictures, already drawn. While the roker in justice—the commissioner—may threaten the in- ocent, to extort money (*pecuniam extorquere*), may com- promise, and sell immunity, and traffic in justice with the guilty, may extend the powers of his courts of inquisi- tion, and, if any prove contumacious, may turn them over to the civil arm for trial and punishment, or may compel

their surrender, by seizure and distress infinite,—while all these things may be,—an essential power must be lopped from courts of justice, another essential right denied to the citizen.

(Art. 3, S. 1 and 2; Art. 6 (2); Art. 1, S. 8, 18.)

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These sections form a part of this grand scheme, and darken even the pictures, already drawn. While the broker in justice—the commissioner—may threaten the innocent, to extort money (*pecuniam extorquere*), may compromise, and sell immunity, and traffic in justice with the guilty, may extend the powers of his courts of inquisition, and, if any prove contumacious, may turn them over to the civil arm for trial and punishment, or may compel

their surrender, by seizure and distress infinite,—while all these things may be,—an essential power must be lopped from courts of justice, another essential right denied to the citizen.

(Art. 3, S. 1 and 2; Art. 6 (2); Art. 1, S. 8, 18.)

SECTION XCVIII.

"We, the people, to establish justice and secure the "blessings of liberty, do ordain and establish this Con- "stitution."

These are the *res gestæ*,—this is the other portion of the statute,—it is the preamble,—yes, it is more,—it is the enacting clause. Strike out one word, obliterate one particle—and the Constitution becomes a void, its enactments a dead letter; for, the words which made it law, hav- been stricken out.

And our corollary is this:

IF, FOR THE EFFECTUAL EXERCISE OF ANY POWER, IN A PARTICULAR MANNER, IT IS NECESSARY TO PASS LAWS DESTRUCTIVE OF LIBERTY, OR SUBVERSIVE OF JUSTICE, SUCH LAWS ARE FORBIDDEN, AND THE EXERCISE OF THE POWER IN THAT MANNER IMPOSSIBLE.

The primary business of the statute in question, is to lay a tax and collect it;—and the secondary business is, to carry this law into effect.

1*st*. *If the tax is laid and collected, the power is executed, the law is fulfilled, is functus officio, and the secondary portions have no base of necessity to stand on,—therefore, they cannot apply.*

The tax is laid and paid; the property of the citizen has been taken by taxation. He has committed no crime, owes no debt, eminent domain asks nothing.

2d. The tax is laid; the citizen owes the debt; the government seizes his property, either by creating a lien upon it or taking possession;—this is distraint for taxes; —if it sells, it may keep the debt and return the overplus; if the tax is paid, the property is released.

SECTION XCIX.

When men formed themselves into States, each agreed to contribute his proportional share for public burdens; none agreed to give his all, when others gave nothing; they entered on principles of equality; and equality is jnstice and liberty.

Mott v. *Pa. R. R. Co.*, 30 Pa., 9. (See pp. 28 to 31 and 35). Wood's Estate, 21 Pa., 114.

Academy &c. v. *Philadelphia*, 22 Pa., 497.

Rutherforth's Inst. B. 2, Ch. 3, S. 5.

Puffendorff, B. 7, Ch. 9, S. 10.

Vattel, B. 1, Ch. 20, S. 240.

If a man's property is taken, through the power to tax, it is by taxation, and taxation must be equal.—If a tax of $50 is laid, the citizen owes it as a debt; can you collect more than $50, as a tax, and yet preserve equality; or, can you force him to pay more than his debt, and yet be just?

This much he agreed to pay, as his proportionate share, in the formation of society;—if, having received him on these conditions, you take from him more, because he is in your power, is it not rapine? (Rutherforth's Inst., B. 1, Ch. 10, S. 7.)

As you cannot take from him more than his share, as a tax, nor more than he owes as a debt, if more is taken, it must be as a penalty for crime.

But no man can be deprived of liberty or property, without due process of law;—no penalty for crime can be taken, without a criminal prosecution; and in such prosecution, the accused shall enjoy the right to a speedy and public trial.

SECTION C.

It has been said that there are but four ways in which the property of a citizen could be taken from him, viz:

1st, for taxes;

2d, for public uses, by the right of eminent domain;

3d, as a penalty for disobedience to or infraction of some public law;

4th, to enforce the payment of his debts.

Chicago v. *Larned*, 34 Ill., 276. Kent's Com.

And in addition to these, we find that the Constitution does not prohibit restraints in the use of property, by virtue of the police power.

Sedgwick, on Stat. and Const. Law, 505 et seq.,

which latter, thus applied, is the enforcement of the rule:

"*Sic utere tuo, ut alienum non lædas*"—with a little addition.

The Police Power is, the right of a State to govern its internal affairs, and, as applied to property, is the right to regulate its use, so that it may not injure, but may conduce to the comfort and convenience of community; for example: nuisances may be required to be abated,—wooden buildings may be forbidden to be erected, where dangerous; regulations, touching safety of walls, &c., to be built, may be made; parties owning lands adjacent to a street, may be required to keep the same in repair, and their side-walks cleaned and in good order, &c.

This power is nowhere delegated to the United States, and is reserved to the States in the Union intact, as it had existed in the States of the Confederation, and in the Colonies, after they had renounced allegiance to Great Britain. (*License Tax Case*, 5 Wallace, 470.)

SECTION CI.

Governments have power over the property of the citizen, thus :

They may compel the owner to so use it as not to injure others; to keep the adjacent ways in repair, and otherwise burden it with certain duties, by virtue of the police power.

They may take it from him :

1st. For taxes, to support the revenues of the Government.

2d. By Eminent Domain, for public use, on paying compensation.

3d. As a penalty for crime.

4th. To enforce the payment of debts.

The Legislature of the United States have no right or power delegated to them to prescribe regulations for the government of the internal police of the States.

Moral crimes, felonies, misdemeanors, nuisances within the body of any State, are all entirely within the exclusive jurisdiction of the several States; therefore, the statute in question derives no efficacy from that source.

Until the tax has become due, and in default, the United States cannot claim that the citizen owes it anything; nor, until he has committed a crime, can it exact any penalty, or abridge his liberty for it.

But two ways remain, in which the property of the citizen can be taken, or for which his freedom to use his own as he will, can be abridged, viz :

By Eminent Domain; and in this case the distilleries and rectifying establishments, placed under the control of the Commissioner, or the articles seized as penalties, are not taken for public use; nor is any compensation pro-

vided in the Act. Therefore, it cannot be by Eminent Domain.

And the sole power upon which the provisions of this Act are based is, the power to tax;—and the special head is Excise.

Every man in community has the right, if there is no statute forbidding, to own a distillery, a mill, a furnace, a factory, or a farm,—to produce alcohol, flour, alloys, cloths or wheat. The United States have no power to regulate the production or the location of the business, the safety of the buildings or the hours of labor,—this belongs to the police power of each State.

It may tax the right to produce, and the production, and this is excise.

The right to tax, pre-supposes the existence of the thing taxed, and an Excise is cut out of something which exists.

A Tax is, a burden laid upon the citizen for the support of the Government; by whatever he pays, he is poorer.

A man pays a poll tax of one dollar, and owns a dollar less; a woman pays nothing, and is not a whit less protected.

Eminent Domain is not a burden; for, whatever is taken, is paid for; and the citizen is no poorer for the taking.

If Government owns a mine, and licenses a man to dig ore therefrom, upon his paying for the privilege,—this is not a tax, for, it is not a burden;—the citizen pays; but, as he receives value in return, he is no poorer. This is barter; and it would be as correct an application of the word to say, my butcher *taxes* me on the meat I eat, as to say, the Government lays a tax on this license.

The Government, by prohibiting anything, or business which a man has a right to do, cannot make itself owner of the privilege, so that it can sell it out, to whom, and as it will. And, as we have seen, the sale of any such privilege or license would not be a tax upon the franchise, liberty or license.

If Government may prohibit manufacture, and make it a privilege which it may sell, it may prohibit farming and any other business, until it owns everything and the citizen has no right to do anything till he buys it.

Now, as Government cannot forbid, or regulate under this power, but can only lay its tax on the manufacture or franchise, liberty or license, as it finds it,—it follows that the attempt to regulate, or forbid, must come under the police power, which is exclusively vested in the States. (5 Wallace, 470.)

And these attempts to regulate are usurpations.

SECTION CII.

The case of *Stevens* v. *The State*, 2 Pike, 291, holds:

1st. That an Act which requires a person to pay a tax of $500, before he can acquire or possess an article of property, is repugnant to the right of acquiring, possessing and protecting property.

2nd. That the Legislature have not the power of prohibiting any person from becoming a merchant, hawker or pedlar until he shall have paid a tax as such, because it is parcel of the public liberty of every citizen, to employ himself and his capital in such manner as he may choose, provided he does not invade the legal rights of another. (p. 302).

3rd. That a right, common to every citizen, cannot—by being first prohibited by law, and then allowed to be enjoyed by such only as will first comply with certain conditions prescribed by statute,—be created a privilege * * *; that a privilege, to be the subject of taxation, must legally exist before it can be taxed: that is, its existence must necessarily precede the tax, and not depend upon the condition of a tax being first paid, before it acquires life; and, being otherwise, the sum paid would be a *bonus, or consideration for obtaining the privilege*, instead of *a tax* upon the privilege. (p. 303).

This reasoning seems, to me, to be unanswerable, and to cover the whole ground of the prohibitions contained in the revenue law before us.

See also *Beebe* v. *The State*, 6 Ind., 501.

If, in the exercise of the power to tax, the tax is laid on the thing, as found, and paid—the power has accomplished

its object, and is *functus officio:* being executed, any attempt to do more under it, is without authority.

We stop a moment to illustrate: If the power to tax, includes the power to regulate, so as to make taxation wholly effectual—the power to tax personal property, would include the power to forbid its removal, sale, change of form, destruction or even use.

And the power to tax real property would include the power to regulate the form and size of lots, and the material and value of the erections.

SECTION CIII.

But what laws are intended by—All laws,—necessary and proper for carrying into effect the levy of taxes and excises?

We answer, by stating the usual means, considered effectual for such purposes:

1st. Distress, whereby the property of the delinquent may be taken, and sold on short notice, to pay the amount, —or, in default of property, his person may be seized.

2nd. Lien, on all property of the delinquent, from the time of delinquency till the tax is paid; with the right to levy the Warrant on it, wherever found.

This is due process at common law, and may, in this case be provided by statute.

Murray v. *Hoboken Land Co.*, 18 How., 272.

Frauds and perjuries against this power, may be made crimes, and punished by penalties of other crimes of the same grade, upon indictment, trial, and full proof of guilt.

To illustrate—: There is a law, imposing divers stamp duties upon papers, the amount depending upon the contents of the instrument. If an officer may be authorized to enter a distillery, by night as well as by day, and examine every part and portion, and require water to be drawn off, &c., he may also be empowered to enter the residences and places of business of all persons, and ransack them at will, requiring or forbidding their assistance at will, and to break into any and all safes, rooms, drawers, &c., and to enter into all bed-rooms and apartments by night, as well as by day, and cut open all beds and other places, where he may think it possible that papers may be concealed,—and to read, copy and publish all papers which he may find, and to seize and destroy any which he may suspect to have been delivered without the proper stamp.

My client has this property and land. He has a right to manufacture not only alcohol, but also highwines and vinegar thereon. He has a right to use the barrels he has bought,—stamp or no stamp, brand or no brand. The Government has not taken them to increase its revenue, or for its support. Yet, duress of fear keeps him out of his rights; and because the Circuit Court did not grant him present relief, his injury is irreparable,—he is a ruined man.

The weight of this duress is very heavy. When, early in my examination of this question, a man said to me—in a public conveyance,—that the law was grinding him almost beyond hope,—I thought to test this question, and asked him what his counsel said of it. He answered: "They say it is unconstitutional and void; and I believe "it is."—I asked him then,—if so, why he did not run, in defiance of it, and kick the first revenue officer, that offered to stop him, into the street?—He answered: "I have "thought of that, and would risk my establishment—al- "most—to test the right; but—there is Joliet Prison, too. "And, even if I was acquitted,—there is the name of— "felon! If my children could be supported during all this, "—I could not have them feel that their father was a "criminal,—I could not leave them a legacy which "would make them ashamed of me.—No!—I dare not "test it, and must—submit."

Life, liberty and property are in the same category in the Constitution. If Congress may divest my client of his property, by statute, it may take his life.

If it may forbid him to use his own, except under the supervision of an officer, or exclude him from any portion of it,—it may confine him in another portion, and place him in complete custody of the officer.

SECTION CIV.

A prayer for an injunction is addressed to the sound judicial discretion of the Court;—nothing could be more strictly Judicial, than the decision whether, in a given case, an injunction ought to issue.

The power to issue injunctions is inherent in Courts of Equity, and essential to the objects of their existence, viz: to remedy those things wherein the law, by reason of its universality, is deficient.

Plowden, 375.

Grotius, DeEquitate, S. 3.

1 Bl. Com., 62.

Therefore—in this case—the Legislature assumes the Judicial function, and decides that in all cases, arising under this law, an injunction ought not to issue.

The Legislature places a void Act upon the statute book, and sets sufficient power to work to execute it, if unrestrained by law;—and then, forbids the law to restrain those officers—acting under a void authority, that is, under no authority—from perpetrating irreparable wrongs and gross oppressions.

The Legislature cannot thus accomplish indirectly what it cannot do directly, and make a void Act effectual by divesting the citizen of the protection of the Courts.

It is time for the Courts to stand fast, and exert their powers. As the King, the fountain and source of power, was, in judgment of law, in all his Courts of Justice, present and repeating the words,—so now, the people are present in like judgment of law in all their Courts of Justice, repeating these same words: "No man shall be taken, "or disseized of his freehold, livelihood or liberties * *, "or any otherwise destroyed, nor will we pass upon him,

" nor condemn him, but by the lawful judgment of his " peers, or the law of the land. We will sell to no man, " we will not deny or defer to any man, either justice or right."

(*Magna Charta*; 2 Co. Inst., 55.)

And, who can silence this voice!—Till the People themselves repeal this law, justice and right must not be denied, neither deferred, delayed, nor put off, to any man;—and all means thereto essential or usual, are right, and law.

The Writ of Injunction is as old as Habeas Corpus,—as essential to the exercise and stability of the judicial power of Courts of Chancery, as writs of subpœna, summons, arrest, commitment or execution are to any Court;—they are the organic constituents of its power.

If irreparable injury and destruction will be done to a man unless restrained by this Writ, and he prays it, and is denied and deferred till final judgment,—is not justice and right to him deferred till too late, and thus denied forever?

This power: to grant and not deny justice and right: to grant them speedily to any man, and not defer them, together with all incidental powers, necessary to its complete exercise—was by the people vested in the supreme and inferior Courts (Const. Art. 3, S. 1), and vested as amply as any power, granted by the people, in the Constitution.

The Courts could as well claim the power to forbid, or prevent Congress from laying taxes, as Congress, to forbid the Courts, and compel them to defer and deny justice.

SECTION CV.

I do not impugn the intentions of the Legislature. Had Congress deliberately set about, intentionally and boldly, to subvert the liberties of the citizen, and to destroy his rights, the people would have remedied the wrong, and not one member who voted for the wrong would ever have entered another Congress; but this comes in a more insidious and dangerous form.

Carried honestly, and with good motives, though carelessly and ignorantly,—should it pass unnoticed and unrebuked, it would form a precedent to use when corrupt measures were to be forwarded by corrupt men; would open a crevice in the mighty oak, through which trickling corruption might enter, and rot and destroy its heart, till nothing but the exterior, and semblance of what it once was, should remain.

The difficulty which has caused all this, has been, that mere ministerial officers and clerks have been brought into undue prominence. I would not depreciate the services they have rendered, in arranging enormous masses of of accounts, and adjusting the difficulties which appeared almost insuperable in the amount to be accomplished, and the haste with which it was to be performed.

But clerks and servants are, under such circumstances, apt to grow conceited. How often a trusted book-keeper, who, after all, has been but a mere machine, gets the impression that he furnishes the brains of the house, and, but for him, financial ruin and disgrace would overtake the principals who plan and carry forward the business! And how often an old foreman, or house-keeper, forms the

belief that the whole house or business is carried on for her or his particular benefit!

And so, these Bureau officers, or clerks, seem to have formed the opinion that they are the Government and the fountain of its ideas; and because Legislators, accustomed to trust them, have adopted their suggestions and acted upon them, often, rather than take time from the press of other business to frame their own,—these ministers or servants of the law, have begun to think that it is their province *to dictate*, instead of *to obey*, laws.

Legislators have permitted them to dictate this statute, and to frame an Act, most cunningly devised to contribute to their convenience, but utterly forgetful of the good of the citizen and his convenience, or even his rights;—but, when they attack the Courts, they strike their masters—masters, ever attent upon their duties, ever watchful of the rights of the people, and who, without fear or favor, will hurl the upstarts back to the menial duties of their true position.

Do I prophesy falsely? Are the old men right when they say, the vigor of plain republican virtues has been sapped by luxury?

It would almost seem as if they were, when we look back and see how much of favor has been begged, how little of right has been asserted, in such cases as this. The lawyers who have done these things, however, are men, 20 years my seniors—men, whose characters have been developed in ease and quiet, and in peace.

They would rather cajole than fight; would rather stand on technicalities than bend their shoulders to hard principles. But the republic has a younger race,—men, whose manhood has all matured since the guns of Sumpter told our last days of ease.

I am tired of this way of begging justice; tired of obtaining right by cajolery and smiles;—weary, weary with the story of lobby influence, causing the just cause to be deferred till the favorite could be served!

A few months since, I went to see an assessor, and asked him to grant my client liberties which he knew were his; but he feared his place, and, though convinced, refused the liberty, and referred the case to Washington. At last, after causing the applicant infinite anxiety and loss, labor and care, he did consent, however,—upon the entreaties of older men than I.

I went but twice, and when I saw and felt the powers in which these officers had intrenched themselves, the oppressions they were exercising to the undoing of great numbers of men,—I felt that it was time that men, who had known no ease, or luxury, should move upon their works and obtain unconditional surrender,—the motto of the era in which we live!

SECTION CVI.

Wherever there is a right, there is a remedy.

Yet, the syllabus to the case of *Deering* v. *York R. R. Co.*, 31 Me., 182, says, the courts will not interfere against the operation of a statute, on the ground of unconstitutionality, in an interlocutory proceeding.

Examination of the case shows that it was an attempt to exercise the power of Eminent Domain, in a mode, which was claimed to be illegal on account of the manner of estimating the compensation; and the allegation was not, of irreparable injury, but that the plaintiff would not be able to enjoy his estate in the manner in which he had been accustomed to enjoy it, if the waste was not stayed. The Constitutional question was a doubtful one, and ultimately settled against the plaintiff.

And I venture the assertion, that there is not a case where a legislature has attempted to usurp powers, not granted to it, and inflict irreparable injury, where the injunction has been refused.

On the contrary, such injunctions were granted, and supported with most cogent reasoning in

(1) *Mott.* v. *Pa. R. R. Co.*, 30 Pa. 9, (*Lewis, C. J.*, p. 34) (*Lowrie, J.*, 34 to 36) (*Knox, J.*, 40).

Moore v. *Veazzie*, 31 Maine, 360, p. 373.

Curran v. *Shattuck*, 24 Cal. 427, p. 432.

Bradley v. *Commissioner*, 2 Humph., 432.

Hilliard on Inj., Ch. 25, S. 1.

(2) If a limited tribunal exceeds its authority, its acts are void, and may be enjoined.

Baltimore v. Porter, 18 Md., 284.

Mohawk, &c., R. R. Co. v. *Archer*, 6 Paige, Ch. R., 83, p. 88.

Cooper v. *Alden*, Harring, Ch. 72.

Hilliard on Inj., Ch. 22, S. 1.

(3) Irreparable injury or loss of business or livelihood, form sufficient grounds.

Webber v. *Gage*, 39, N. H., 182.

Justices of Pike Co. v. *The Griffin, &c., Co.*, 11 Geo., 246, pp. 248 & 250.

Catching v. *Terrell*, 10 Geo., 576, p. 578.

Long v. *Beard*, N. C. Term Rep., 256.

Hilliard on Inj., Ch. 1, S. 13, 17, 31; Ch. 13, S. 1.

(4) And this is a question of right and principle, and not of expediency. If the Court refuses to grant preliminary injunction on good cause shown, it is error.

Rowley v. *Van Benthuysen*, 16 Wend. 369, per Bronson, J., pp. 371 to 384.

Tucker v. *Carpenter*, 1 Hemp., 440.

Hilliard on Inj., Ch. 1, S. 18.

(5) "Law" includes "Equity"; violations of equity should be enjoined.

Stockdale v. *Ullery*, 37 Pa., 486.

SECTION CVII.

As precedents, to justify this Act, they may cite:

1st. Laws of Quarantine, which detain ships coming from infected ports.

These laws are strictly police regulations, growing out of the most direct application of the maxim: "*sic utere tuo, ut alienum non lædas.*"

Bringing a ship from an infected port, or clothing from a house, where it has borne great risks of becoming filled with seeds of death, to scatter those seeds among, and destroy the living, is using ones own so as not only to injure but to destroy others.

2nd. Laws against smuggling, which forfeit the goods and the vessels in which they are conveyed, for the non-payment of the import duties.

The right of Government to prohibit importations, or to prescribe conditions upon which property can be acquired from foreign nations, is as old as Magna Charta.

And until these conditions are fulfilled, the title to the property cannot vest in the citizens,*in* the country.

Beyond the borders, as against all the world, the property may have become his, yet, within those borders, he is not entitled to claim it, until he has complied with the conditions of its admission. And the property, being thus without owner, is taken by the Government.

Again, smuggling is a crime, not committed within the body of any State or County, but beyond, and upon the border; "therefore, *lex terræ* extendeth not to it, and the Admiral hath conusance, thereof,"—and Admiralty takes the ship, conveyance, or article, as a prize of conquest or of chase.

3rd. Laws against gambling which forfeit the tools and implements with which the offence is committed.

4th. Laws against horse racing, under which, it is said, the horses, unlawfully used, are forfeited.

Gamblers' tools, burglars' tools, implements which can only be used against the good of society, are a nuisance; and when once they have been used, so as to stamp the character indelibly upon them, they are seized to abate the nuisance.

Punishment is for the prevention of crime. If a man obtains his livelihood by crime, you imprison him, to protect society, to reform him, to make it impossible for him to commit any further crimes. If you leave to him the implements of his crime, and which possess little value for any other purpose, you make it easy for him to commit farther crime, you tempt him to it, and arm him against society.

If race horses may be thus forfeited, it is upon the same principles; a doubt is expressed, in the language of the Court, as to the power to confiscate them.

Congress has no power to pass laws for the punishment of crimes, except such as are committed within its exclusive jurisdiction, or, against the United States. The internal police, and punishment of crimes against it, within a State, belong exclusively to it.

U.S. v. *Bailey* (murder, within Indian reservation, in Tennessee), 1 McLean, 234.

New York v. *Milne*, 11 Peters, 102, p. 139, &c.

License Cases, 5 How:

per Taney, C. J., p. 574.

McLean, J., p. 588.

Catron, J., pp., 599 & 600.
Nelson, J., p. 618.
Daniels, J., p. 617.
Grier, J., p. 631.

Every individual may lawfully acquire and possess any description of property, if it does not destroy or deprive some other person of his property or some enjoyment thereof.

The Legislature cannot restrict any one from making or purchasing a billiard table, but may, by law, so regulate or restrict the use of it, as to prevent any injury from the use of it to the public morals or public good. They cannot tax it out of existence, accomplishing indirectly what they cannot do directly.

Stevens v. *The State*, 2 Pike (Ark.), 291.

In case of a person, exercising the trade of a negro trader, without a license, it was said: The power of States to tax privileges is not intended as a source of revenue merely, but also to impose restraints upon the exercise of certain privileges, whose tendencies were of a nature to encourage vice and disorder, or were contrary to public policy.

Adams v. *Somerville*, 2 Head (Tenn), 366.

See also, *Tenny* v. *Lentz*, 16 Wis., 566.

The Constitution, requiring taxation to be uniform, does not impose any restriction on the police power of the Legislature in granting licenses for anything that may in its nature be the subject matter of a license.

The right existing in a Plank Road Co. to use its road, —an impost or excise of one per cent. of its gross earnings was laid. This was a tax on the license, not a bonus for it.

Attorney General v. *Winnebago &c.*, Co., 11 Wis., 35.

Mayor &c. of Baltimore v. *Baltimore & Ohio R. R.* 3 Gill. (Md.) 291 and 2.

Gordon v. *Tax Appeal Court*, 3 How., 145, 146, 150.

The question, whether a thing is a nuisance, or not, and hence liable to forfeiture, is Judicial, and to be determined by the Courts alone.

Beebe v. *The State*, 6 Ind., p. 515.

Doe v. *Douglass*, 8 Black, p. 10.

See *Fletcher* v. *Peck*, 6 Cranch, 87.

From all this we see that, though the precedents might be good, as showing authority in the States to do many things, they relate to matters exclusively within State jurisdiction, and show no authority in Congress to do like acts.

5th. They may also cite as precedents:

Laws against selling liquor to Indians, under which the liquors themselves may be forfeited. Liquor maddens the Indian and makes him wild for white mens scalps; offered to them, it is only baneful and noxious.

Again: Its sale, to them, is either strictly under the Police regulation of States, or without the jurisdiction of the Civil Magistrate, and under the summary powers of military or naval force, or under the power to regulate commerce with them, as with foreign nations.

It may be suggested that all these properties apply to spirits, and the manufacture is a crime.

I answer:

1st. For all mechanical purposes to which they are put, these properties do not apply; therefore, spirits are not, of necessity, nor always, *mala in se.*

2d. That the only jurisdiction Congress has over the manufacturer, is, to tax him for purposes of revenue only,

and make him pay the tax, and its only punishments are such, as can make its taxation effectual.

That, if the inflictions of penalties, and regulations against moral crimes, committed within the body of any State, authorize Congress to punish making whisky, as a moral wrong, it may also punish drinking, or vending for drinking, or vagrancy or larceny or any other moral crime.

The Legislature cannot surrender any portion of the legislative authority, with which it is invested, or authorize its exercise by any other person or body.

Mott v. *Pa. R. R. Co.*, 30 Pa. (Lewis, C. J.) pp. 27 to 33; (Lourie, J.) p. 34, &c.

C. W. & Z. R. R. Co., v. *Comr's*, 31 Ohio State Rep. 77, p. 87.

SECTION CVIII.

The right of taxation has been delegated to the Legislature, only to be used for the purpose of accomplishing the lawful object with which it is charged: It can only be exercised to raise money for these purposes; and any attempt to use it otherwise, is beyond the delegation.

Debolt v. *The Ohio L. I. & . T Co.* 1 Ohio State Rep., 563, pp. 578 to 583.

The Legislative authority includes the control over all existing laws, by amendment or repeal.

Toledo Bank v. *Bond*, 1 Ohio State Rep. 622, pp. 667 and 668.

These authorities are not shaken, by

Piqua Bank v. *Knoop*, 16 How., 369.

Mechanics, &c. Bank v. *Debolt*, 18 How., 380.

" " v. *Thomas*, 18 How., 384.

Dodge v. *Wolsey*, 18 How., 331,—

as these cases were decided on the ground, that the Statute in question violated the contract of the State.

Every portion of the Statute which gives to the Commissioner, or his subordinates, power to prescribe rules for the use of property; to require a man to add to, take from or alter his property; or requires him to surrender or furnish any keys to them; or to admit any person to examine his books, accounts, materials, machinery, or anything else, or take possession, charge, oversight or control, of any of his business; or prescribe how he shall build, use or occupy anything that he has; or to register the same for any purpose but to be taxed; or which forbids the use of any of his property, or requires any conditions, surrenders or bonds, in order that he may use it, is, to that ex-

tent, a divestiture of his property. And it is neither for taxes,—for, the Government does not take it for revenue, or place it in its treasury; nor by Eminent Domain, for, the public get no use and pay nothing. Nor is it for debt, for, he owes nothing; nor for a penalty for crime,—for, none has been committed; nor can it be under the Police power,—that is reserved to the States.—It is therefore, an arbitrary deprivation of property, and—void.

And every penalty, inflicted for the use of the property or resistance to the officers, in their trespasses and commands, is a violation of the liberty of the citizen, an unwarranted duress.

What are excessive fines, or cruel and unusual punishment, is a matter for the judiciary to determine.

The construction of all laws is a judicial, not legislative duty.

Since every man is to be "punished according to his "fault, for a small fault according to the fault, and for a "great fault, according to the greatness thereof,"—we may hold that every punishment, which is disproportioned to the offence, is excessive, cruel or unusual.

And if the penalty of any section or portion is excessive, as to any portion of the offence enumerated as punishable therewith,—the clause, imposing such penalty, is void, in toto.

For instance, under section 4: If a man fraudulently should produce one million gallons of spirits in a concealed place, with full knowledge of, and to evade the tax, the maximum penalty of $5,000 and two years imprisonment, would not be excessive; but if an ignorant man, not knowing of the law, with perfect integrity of motive, should purchase a gallon of alcohol from an unauthorized

distillery, and use it in some process of manufacture,—the minimum penalty of the section, $500 fine and six months imprisonment, would be out of all proportion to the offence: excessive, cruel, unusual and terrible. And as the Courts will not hold that, on the trial of each indictment, the Court may determine, from all the facts in the case, whether the penalty as to the prisoner, charged, is excessive or not, and whether the statute as to him is valid or void. As it cannot be valid, as to all, it must, as to all, be void.

SECTION CIX.

As to Forfeitures. The fines and other defined penalties are according, and in proportion to the offence; or, they are not. If they are not, they are void;—if they are, and anything is added, it destroys the proportion, and the whole is void. Again: In case of forfeitures, the grade of crime does not determine the amount of punishment.

Instance, under section 19: If the owner of an establishment, worth $500, shall obliterate an entry in a book, he shall forfeit the establishment.

If another owner of an establishment, worth $200,000, obliterates a precisely similar entry, he shall forfeit his establishment also.

Suppose, before this misdemeanor, both were of equal wealth and position,—one is reduced to penury, the other does not feel the deprivation a day.

Again: It is an amercement. And, by the statute of Westminster Primer, affirming prior Charters, and the Constitutional right,—no man can be amerced without reasonable cause, saving to him his livelihood, and that by his peers. And there is no provision in this statute for an amercement by a jury in any manner.

Again: These amercements extend to the freehold, the contenement, the merchandise, the wainage, the means of livelihood—contrary to the great charter and the ratification thereof.

Now, either the rights, claimed by Englishmen under the great charter, were intended to be preserved in our Constitution, or they were not. If they were, this statute, as to all its amercements, is void; if not,—I leave your

Honors to tell what rights we have reserved under Amendment No. 10.

As taxation must be equal—if Government has already laid a tax upon a license for the year, the utmost limit of the new law can only require the licensed concern to add enough to the former payment, to make the contribution equal to others, or his fair share for its support.

SECTION CX.

As to the power to lay Excises,—is it necessary, to carry into effect a license tax on a trade, to forbid one half of the trade from exercising it? Is this consistent with the liberty of the citizen?

What is, laying an Excise tax upon a trade? Is it laying a proportionate tax upon every one exercising the trade, or who may exercise it, or upon every article produced? If so, and the tax is paid,—what more is necessary to carry it into effect? Is not the power *functus officio*, and ended?

If the excise is not effectual, because half of those who should, do not pay,—do you make it more effectual by forbidding half of those who are willing, to pay?

We will take it on another ground. *Such powers, assumed by Government, are utterly subversive of liberty.*

If you may forbid a man to make shoes, sell groceries, and give advice for money, in the same room or enclosure, you may forbid all. Or, if you may forbid his exercising his vocation within 600 feet of another of the same trade, you may extend the limit to 600 miles.

If you may compel half the distillers, or rectifiers, to stop, you may compel all, or all but one. If you may divest this one of half his liberty, you may take it all, may wall him in, and set sentinels over him, and, this would make the excise effectual as to that trade.

Again: If you may divest men of their liberty or property, without due course and process of law,—as Judge Comstock well says in Wynehammer *v.* the People—Life, liberty and property are in the same category, and, you may take his life.

In the same case, also, it is said, upon high authority, "that the right of property is a complete right to do what "you please with a thing, to use or let alone, to sell, to "mortgage, to alter, or even to destroy."

He also says:

"I can form no notion of property which does not in- "clude the essential characteristics and attributes, with "which it is clothed by the laws of society. In a state of "nature property did not exist at all. * * * Material "objects therefore are property in the true sense, because "they are impressed, by the laws and usages of society, "with certain qualities, among which are, fundamentally, "the right of the owner to use and enjoy them exclusively, "and his absolute power to sell and dispose of them; and "as property consists in the artificial impression of these "qualities upon material things, so, whatever removes the "impression, destroys the notion of property, although the "things themselves may remain physically untouched. Wynehammer *v.* The People, 3 Kern, 396, per Comstock, J. See also p. 397.

SECTION CXI.

Lex terræ and *Admiralty* are radically diverse in their fundamental doctrines, their modes of acquiring jurisdiction, their presumptions, trials, evidence, judgments and process.

By the law of the land, a man cannot be deprived of his property for crime or debt, except by a trial by jury, according to the due course of the common law.

The incidents of this trial are, first of all: that the courts shall obtain jurisdiction of the person of the defendant, either by personal service of the writ upon him, or attachment of his goods, and publication or proclamations, according to the due course of the common law. Having attained jurisdiction, the courts may compel him to answer, on a day, certain; and if he shall deny the accusation, which must be explicit and clear, he must be confronted by the witnesses against him, and allowed to cross-examine them, and produce witnesses in his own behalf.

If he shall make default, having been duly summoned and solemnly called, the court, in civil actions, may hold that he has waived his right to a trial by jury, as well as confronting witnesses and cross-examination.

In criminal prosecutions, I have yet to learn that he can so waive the right to a jury. In either, he must have his day in court, and on this his day in court, whether present or defaulting, he is entitled to all the presumptions of the common law in favor of his innocence. And, if on that day found guilty, from the evidence against him, judgment may be entered, and final process issue, to divest him of his property.

In *lex terræ*, the fundamental question is: *Is the person guilty?*

In Admiralty, the fundamental question is: *Is it a lawful prize?*

Originally, all mariners were pirates, and preyed upon the commerce and coasts, not only of foreign nations, but also of their own country;—might made right; and seizure and possession gave property.

To correct these evils, national navies took a monopoly of the business; or licensed those of their own nation who engaged in it, and required those persons, licensed, as well as the subordinates in the navy itself, to submit the conquests to the admiral, who held an inquest on the deck of his vessel, and from the testimony of the captors, and personal inspection, summarily decided whether the prize was the property of his own nation or an ally, or not. And, if not, or, if it had been used unlawfully,—held it a lawful prize.

When the great increase of business made it impossible for the admiral to attend, with his vessel, to the matters, admiralty courts were established on shore; but the same principles still governed, and now govern them.

The proceeding is *in rem*,—is the thing a prize? Has the thing collided with any other thing? Have stores, repairs, services, been furnished to the thing? These are the questions tried. The person who controlled its motions, might have been totally unauthorized by the owner, and, as to him, a wrong-doer; this has nothing to do with the decision. If either of the questions are answered in the affirmative, the thing is a lawful prize, and may be sold to pay them.

Instance: A vessel owner authorizes the master to sail to a neutral port. He wilfully disobeys instructions, and

tries to enter a blockaded port; is captured, and vessel and cargo confiscated.

Again: During the late war, a steamer was, with the cargo, stolen from Boston, and, in attempting to run the blockade, into a Florida port, was captured. Being taken to Key West, she was proceeded against; no process, whatever, was directed to the real owners, but only against the vessel; and, being tried, *ex parte*, she was found derelict, was sold as a prize, and, the purchaser sailed her back to Boston, and there holds her.

This illustrates Lord COKE's remark: "If an offence be "committed on the high seas, lex terræ extendeth not to "it; but the admiral hath connusance thereof, and may "proceed by other proceedings than have been allowed by "the laws of the realm." Co. Inst., p. 46.

And the converse of this proposition is true, that, if an offence be committed within the body of the realm, on land, *lex terræ* hath "connusance" thereof, and precedents of marine law extend not to it; nay more: they are expressly prohibited by Magna Charta.

In the case of The Mary, 9 Cranch, 126, on page 142, Chief Justice MARSHALL, reviewing a judgment in a prize case in admiralty, says:

"A sentence in admiralty is said, not only to bind the "subject matter on which it is pronounced, but also to "prove, conclusively, the facts which it asserts. * * *

"By the rules of the court (of admiralty) the condemna- "tion of the vessel was inevitable, not because she was, in "fact, British property, but because the fact was charged "and was not repelled by the owner, he having failed to "appear."

Again (p. 144): "When proceedings are against the "person, notice is served, personally, or by publication;

"when they are *in rem*, notice is served upon the thing "itself."

And page 145: "The question of prize is one, of which "courts of law have no direct cognizance."

See *Bradstreet* v. *Neptune*, 3 Sumner, 604 et seq.

We have seen that the forfeitures of this statute are not taken by the power to tax, but by the power to punish crimes against the law laying the tax, and are, therefore, penalties for crime. Now, in all criminal prosecutions, the accused is entitled to a trial by jury.

There must be some person accused;—a stick, a stone can be accused of nothing, being utterly irresponsible; therefore, the proceeding is against the person of the accused; and he is entitled to have the question of his guilt tried by a jury, and be confronted by the witnesses; therefore, suits for forfeitures or penalties, of this statute, *in rem*, as in admiralty, are utterly unauthorized, and the threatened seizures under this statute, high-handed trespasses. (See Section 116 *post.*)

SECTION CXII.

Should a distiller or rectifier kill a revenue officer, knowing him to be such, for entering his establishment,—I think, from all the authorities, it would be manslaughter; because the officer was only a trespasser, and he ought to have laid his hands gently upon him, to eject him.

Yet, if he should kill him, breaking in, in the night time,—I submit the presumption would be, that he did not know that he was an officer. Or, if he should kill him, being in, the presumption would be, that he laid his hands gently upon him, and the officer, resisting, forced him to kill him, *se defendende.* And these presumptions would be so strong, that, unless repelled by positive testimony, a verdict of acquittal must in every case be rendered.

SECTION CXIII.

We find, from all these authorities: The law of nature; —the fundamental laws of England,—and the Constitution, as expounded by contemporaneous construction, by its objects, by the wrongs it would remedy, by subsequent decisions, and, more than all, by its own language,—that we are freemen in person and estate:—

And pray this Court to repel usurpation by the Acts of Congress, and by color thereof, which is destruction to us. And that all these Acts, so destroying us, may be declared null and void; and all rules and prescriptions of the Commissioner may also be declared void; and he, and all other officers and persons, be forbidden to carry this statute, or any rules and prescriptions made by color thereof, into effect, against us or our property.

SECTION CXIV.

In the Court below, as the Bill was originally presented, it did not appear that defendants Allen & Ferguson had done anything but to assume office and threaten to execute the Act and the directions of the Commissioner, thereunder. It appeared, however, that the Commissioner had issued the instructions attached to the bill, and other secret ones; and that, acting thereunder, the Assessor and Collector forbade plaintiff to use his property and threatened to prevent it by seizure, if he should use it.

The case was carefully and ably argued by the United States' Attorney on the motion for a preliminary injunction; but the following points were not answered, or attempted to be answered, by him:

1. The Constitution is a Law of Liberty.
2. Every man may own and possess any property, freely and fully.
3. Excises and other taxes are to support government.
4. Prohibition does not support government; nor regulations, nor espionage, nor forfeiture, deprivation of liberty, nor fines.
5. Everything, which deprives a man of full control of himself or his property, to that extent deprives him of his liberty.
6. To divest an individual of his property, against his consent, every substantial requisite of law must be complied with.
7. Wanton deprivation of liberty, in any particular, is neither necessary nor proper to carry an excise tax into effect.

8. A leasehold is property,—a rectifying establishment or a still.

9. When the tax is paid, or tendered, the levy thereof is carried into effect.

10. A lien cannot exist except as security for an existing debt or duty. An incident cannot precede or survive the principal thing on which it is based,—and out of which it grows.

11. Executive officers must be commissioned by the President, and he must be responsible therefor, as chief executive.

12. These statutes gain no powers from right of police regulation.

13. Their exactions from the citizen are *purely* taxes, or *purely* as penalties for crimes.

14. The excise laws of England form no precedents against the plaintiff herein.

15. A statute, against common right and common reason, is against Art. 9 of the amendments to the Constitution, and void.

16. If a statute, faithfully executed, works a divestiture of rights in, or an essential loss or destruction of or in the property at which it is aimed, it is void.

17. An act, inflicting a penal forfeiture, which does not require notice to the owner, in due course of law, of the reason and cause of the accusation by reason of which the forfeiture is sought, and provide the form of trial by jury as at common law, with all the safeguards to the accused in a criminal prosecution,—is void.

18. What are excessive fines and cruel and unusual punishments, is a judicial question, exclusively.

19. If the penalty of a class of crimes is excessive as to any, it is void as to all.

20. Arbitrary forfeitures, and penalties dependent on accident, are void.

21. Forfeitures are amercements; must be for reasonable cause; must not extend to the livelihood or freehold; must be ascertained and assessed by the jury who try the crime.

22. An excise must be cut out of an existing thing.

23. Courts of Admiralty cannot try crimes, committed within the Jurisdiction of *lex terræ*.

24. Trials by *lex terræ*, must be according to the ancient form, rules and evidence. (Bac. Abr. Title Courts.)

25. A definite person must be charged; must have his day in court; must have the accusation distinctly stated to him, and be confronted with the witnesses against him, face to face; have counsel for his defence, witnesses in his behalf, and presumptions of his innocence.

Insert the words "ten barrels," one "engine," or any *thing*, in place of "a definite person,"—and ridiculous absurdity is patent.

26. These statutes (incorporated in the bill), faithfully executed, work an extinguishment of plaintiff's property, his livelihood and vocation, and a deprivation of his liberty.

27. It is the duty of defendants as mere Executive officers, faithfully to execute them, unless restrained by the courts.

28. Assuming the Executive office under these Acts, is the first step against the plaintiff by the defendants, placing him in duress;—the next will work irreparable injury.

29. The Counsel contended that there have been no precedents in cases of Excise.—We answer, that this will

make one. And it is, therefore, most important that the decision be correct. And it must be settled upon the settled principles of law. Minor and technical distinctions between this and cases where these principles are devel oped, are not arguments against their power.

Pointing out a distinction without a difference, is no argument of law.

30. If this case, correctly decided, overthrows forms or proceedings which have grown up from the objection never before having been raised, we cannot swerve from duty because of policy, but must decide as law and justice require. Even if it strikes at our own acts, honor compels us to admit it, when wrong, rather than persist in error.

31. *Honor!*—What volumes of disgrace are spoken in the confession of those Judges, who felt themselves "too weak to withstand the pressure of the Legislature and the bar," (*Greenough* v. *Greenough*, 1 Jones),—too weak, to administer justice *according to the supreme law of the land*, —and thus became the groveling sycophants of tyranny enforcing void statutes which were not law. Perjured betrayers of their trust,—too weak to withstand temptation, —'twere better for their names and for their country had they not been born!—

The thought, that life, liberty or fortune depends upon the fiat of any man, is awful. But, when that fiat is spoken, —unswerved by power, and unawed by responsibility,— to protect the weak against the assaults of passion, prejudice and power, it is, above all things human, most sublime.—

Conquerors, Princes, and Prime Ministers, have won great names,—great hollow, sounding, names.

But Judges who have dared to do right, have won for millions happiness and hope.

As the world looks dark, as corruption in high places, and wrong everywhere sicken the soul, and night seems about to close over the cradle of liberty,—one star alone rises to cheer the waste, clear, free and pure;—it is the star of Justice! It shall go before. Wise men will follow it; and, where it stops, shall find redemption for the land.

We have tendered the responsibility to this Court. This plaintiff is the representative of the weak, because he is the first thus to claim the protection of the Courts. And we ask of your Honors, Justice,—as you hope for mercy at that tribunal, where you must appear and meet your oaths and trust, in judgment for or against you.

Such was our reply in the Circuit Court. But, after considerable deliberation, the Court refused the injunction, but did not dismiss the bill; and, afterwards, gave leave to amend and file a supplemental bill.

SECTION CXV.

We will briefly consider the objections which have been made:

First, in the Opinion, in refusing the injunction on the original Bill; and, *second*, the other points discussed by Counsel.

1st. It was objected that, the plaintiff did not allege that he had done anything but take the lease, or been stopped in anything which he had begun.

The Amended Bill and the Supplemental Bill seem fully to cover this point, especially in the light of *Osborn* v. *U. S. Bank*, 9 Wheat., in which case, first, (p. 740), Ohio passed an Act, laying a tax of $50,000 on all banks, doing business in the State without the authority of its laws, and directing the Auditor to issue a warrant, on the 15th of September, for its collection.

The Bill (page 740) recites the Act, and states that Osborne gives out that he will execute the said Act—(our Bill is precisely the same). The Court granted the injunction. (p. 740. The Counsel, on appeal, (p. 744) makes the point, that "the case made in the Bill does not "warrant the interference of a Court of Chancery, by in-"junction or otherwise," and argues it elaborately (pp. 748 to 755).

And the Court, by Chief Justice Marshall, considers and answers this point (p. 838 &c.), holding the proposition that a void Act can afford the person, who executes it, any protection,—as extravagant; and that such person is liable to the extent of the injury in an action at law (p. 839). (All this is admitted in our case).

And that, when the Act made it the duty of the Auditor

to execute its provisions as a ministerial Officer, and he had declared that he would perform his duty, it was morally certain he would proceed to execute the law (p. 840). *And that, if the remedy at law against him would not be a real and substantial remedy,* ACTUALLY REPAIRING THE INJURY, the injunction ought to issue, and did properly issue (pp. 843, 844).

In our case, it was morally certain that the officers, who had said they would execute the statute, would do it.

And morally certain that, when Mason took the lease, before the passage of this Act, agreeing to pay $5,000 a year, rent,—that he took the property to use; that, when these officers threatened him with seizures, forfeitures and destruction to his property if he did use it,—that he was prevented by them; and that, when they did seize it, Nov. 1st, and controlled it, and prevented his use thereafter, by taking it to pieces, and when he applied for a license and was refused,—that he was losing money under their compulsion.

Men do not lease property, at large rents, to lie idle, any more than they assume office to neglect its duties; and do not tender a license tax on a matter, they would not do, if they could.

It is to be observed that, in the original bill, in *Osborn* v. *U. S. Bank*, no allegation that the Bank would continue to do business, Sept. 15th, is made, but merely, that the statute laid a tax on all which should continue to do business; and the auditor gave out the he would execute the act. This case, meets and fully answers, the position taken in the opinion, and shows, conclusively, that the injunction should have issued on the original bill. (It is but just to the Court below, to state that this case was not cited, in argu-

ment, or discovered by me till long after the opinion had been delivered.)

2nd. The officers have commanded the lessee of the distillery, bound to furnish steam to plaintiff, to take out the steam pipes; and it is morally certain that, the minute plaintiff repairs and starts his alcohol still, this order will be rigidly enforced, whether the mandamus is granted or not,—thus depriving plaintiff of a right, worth more than $1000 a year, and compelling him to over $2500 expense, and more than as much danger. Yet these pipes are appurtenances which he has acquired as property, after they had been constructed under the approval of the Government, and used under its license,—and now they may and will be taken from him, at the command of an irresponsible officer, because, forsooth, his alcohol works stand, just where they did a year ago.

3rd. The Bond:

The Court below simply ignored our position: that it is parcel of the common liberty of every man to use his time and his capital as he pleases; that, for purposes of taxation, purely, Congress must lay its tax on the person, product, property, or business, as it finds it,—as the citizen has pleased to have it. That Congress cannot impose a condition on the exercise of the franchise, or ownership, or use of the property—because, the citizen, without the statute, owned both franchise and property and the right to acquire and possess, in any manner, freely and without condition. And, when Congress imposes a condition, it passes the boundary of taxation and enters that of regulation, or, worse than that, it commences the deprivation of rights, without any process but its bare assumption, that, if one is not deprived of his rights, another may not pay his taxes.

Look at the instance of this plaintiff: He desired to use his property for distilling, as he, but for the statute, has the right to do. The statute says, he shall not use it unless he gives a bond; he cannot give a bond; therefore, the statute says, he shall not use it at all. What has the statute done? Has it taxed him? No; it has taken from him a right. But, in taking from him this right, has it not done something necessary and proper, effectually to lay and collect taxes? It has done something to assist laying and collecting taxes,—but, it has done something improper. Congress has power to lay and collect taxes to pay the debts, and provide for the common defence, and general welfare of the United States. It is clear that Congress has not proceeded against this plaintiff under this clause; it has not laid or collected a tax; as to him, it has seized and deprived him of a right, which will not pay the slightest debt or buy a grain of powder. It has seized that which it cannot use, but, which, in seizing, it destroys. And it is plain, that the Court below ranged this among the class of necessary and proper laws, which Congress may pass to carry into effect the power to levy and collect taxes to pay debts, &c. It may lay taxes by statute, may collect them by taking them, or compelling the citizen to pay them. These are certainly tremendous powers. And the exercise of this tremendous power is extended, not to compelling this plaintiff to pay anything, or making any taxation effectual as to him, by the condition, but by destroying his rights by a condition which may operate upon another, so as to make the taxation effectual as to him; that is:—the plaintiff is caused to suffer, for the purpose of making a stranger do his duty! If there was no condition, and both should carry on their business of distillers, as of right they might, and the tax was laid,—the

plaintiff doing his duty and paying his whole tax; the other, being an irresponsible person, backed by a capitalist, evading it,—the condition is applied, and plaintiff is deprived of his right, thereby, and of his opportunity to pay, while the other is only compelled to do his duty.

This only illustrates the underlying principle that, Congress may tax; but cannot take away the right, except for crime, by due process of law.

Much assumption of power has been based on the obiter remark of a judge of this Court, that, "but two "restrictions are imposed on Congress in the exercise of "the power of taxation, i.e., that direct taxes must be in "proportion to the census; and excises, &c., must be uni-"form; and that, within these limits the power is absol-"ute." We can admit the correctness of the doctrine. But, when it is assumed by any tribunal that this extends beyond the taxation itself, pure and simple, we must enter our protest, and, though the Court below ignored the position, still insist that Congress is not absolute, and that nothing is proper, which contravenes the rights expressly set forth, or reserved, in the 9th Amendment, as part of the common liberty of every man.

4th. As to the distance from the distillery: This building, all above ground, and surrounded by streets (the one, between it and the distillery, 200 feet wide), has no dark points about it, and is tabooed *by an arbitrary rule.* If its existence within 600 feet of the distillery, subjects it to entire or partial destruction (and anything, which destroys its use, is destruction of its most valuable component), it comes with bad grace *ex-post facto*, after the innocent investment of $30,000 in it, under the inspection and approval of the Government and subsequent license, and, in

point of fact, while it was licensed; the Government is estopped from forbidding its use.

This is as extreme a view as is necessary to the use of the property as a rectifying establishment; *for the other uses claimed, we go back to the fundamental principles.*

5th. It the judicial power does not control the matter of taxation, our form of Government is not Republican and circumscribed in its powers by accountability to the people; for in the United States, *taxation and representation have no necessary connection.*

Loughborough v. *U.S.*, 5 Wheaton, 317.

We have not been accustomed to think that the Constitution gave absolute and irresponsible power to any authority. And further, the case in 18th Howard, instead of warranting any extension of power in Government, at all, supports a distress warrant, or writ of Extent, with great caution, and only, because in Magna Charta, the grand Charter of Compact, the right to this summary proceeding *was expressly conceded by the people and reserved by the King*, and thereafter, for nearly 700 years, had been constantly in use, as due process of law.

An express reservation on the one hand, and express grant on the other, is not indicative of liberal intentions on the part of the grantors as to every matter of like nature. Nor is the careful discussion, and support of a single, seemingly oppressive power, by the Courts, on the basis of precedents which support that alone, to be stretched to cover every conceivable exertion of oppressive prerogative.

It is a false dictum and a false assumption, that the Legislature is absolute as to taxation; that taxes can only be imposed on the citizen by his representatives, and his representatives are his only defence:

That by them he may be traitorously betrayed and despoiled, and the Judicial power of the Government made subservient to their will, or so throttled and hampered, that it cannot defend him:

That the Courts can be made an engine of tyranny, or a cypher, as the representatives may chose.

Sedgwick, in his treatise on Statute and Constitutional Law, speaks of the power of taxation as, this *tremendous power of eminent domain*, before which every citizen lies prostrate.

And others, with, what seems to me, equally superficial examination, have spoken of it as a power, against which the only security is, that it is exercised by the people's representatives.

It is true that the cases in United States Courts, upon taxation by the United States, are few and far between.

The first is: *Hylton* v. *United States*, 3 Dallas, 171, which decides that a tax on carriages is not a direct tax, but a duty or impost, and, being uniform, is a valid tax. And, as if to assert the right of the Courts to examine the whole subject, without reference to the fact, that these taxes are laid by the representatives of the people,—the Court ignores questions upon the matter, altogether, and examines elaborately the general subject, and supports the tax in question, on its general equity and uniformity.

The next case is that of *Loughborough* v. *U. S.*, 5 Wheaton, 317; which decides that the power of taxation by the Government, extends to all places within its dominions, as well to the District of Columbia, and the Territories, which *are not represented*, as to the States which are;—that *there may be taxation without representation*; but that, if the power is exercised, it must be in accordance with the rules of the Constitution, viz: if direct, in proportion to the

census, and if a duty, impost or excise, it must be uniform. And Chancellor Kent speaks of the paradox, that, in the United States, taxation has no connection with representation.

Can it be contended that a citizen of a territory can be arbitrarily subjected to burdens, contrary to the law of nature, tyrannous, and against reason, by a power, in which he is not represented; and that the Courts can be divested of their power to protect those rights, which are called absolute, inherent, and inalienable?

And, if a citizen of a Territory has a right to the protection of the Courts,—has not the citizen of the State?

There is nothing in these cases from which the slightest doubt of the citizen's right to protection against Congress, can be inferred.

If it is true, that Congress can enact statutes in defiance of the Constitution, and can divest, or has divested, the Courts of power to protect the citizen; then, indeed, we all lie prostrate, not alone before the power of eminent domain, but before a more tremendous power,—an absolute and unchecked assembly.

The limited department has grown absolute, and the absolute department has been destroyed.

See 2 Dallas, 308, 310, 316; A. D. 1795.

DuChastellux v. *Fairchild*, 16, Pa. 20.

6th. Plaintiff had the legal right to lease these premises, and take steam from the distillery. In this, and in his preparation to run, he was carrying on a lawful business; and, had he run at the time he leased, it would have been lawful.

What, then, gives the defendant the right to require his steam pipes to be taken up, and to dismantle his works,

and reduce them to idleness, and keep them idle,—damaging him $10,000 a year?

Simply the condition that, by accident, his business is near another mans, innocently and confidingly placed.

Is not the enforcement of this law an unreasonable condition, as a prerequisite to a lawful business?

Each of these parties are liable to wrong. If the distillery had been leased the day the rectifying house was, and, after the passage of the Act, this plaintiff had obtained a license, the distiller's property would have been effectually divested.

In the preceeding argument it has been proved beyond question, that, divesting a thing of its use, divested property. And the statute divests the only thing of value either of these parties has obtained, the moment the other obtains a license; therefore, either the statute is void, not being due process of law, or this case is excepted out of the statute.

7th. The learned and very ingenious argument of counsel was largely occupied in drawing distinctions of fact, between this and other cases, and has shown that precisely such a case never existed, as the basis of decision. Grant it; and it is answered by our authority (9 Wheat., 841): "Although the precise case may never have occurred, if "the same principle applies, the same remedy ought to be "afforded." And the illustrations used, show that the Supreme Court then, in seeking to administer substantial right, would allow no flimsey pretext, or anything but the most essential difference, to remove the case from the rule.

8th. But, perhaps the great objection is, that,—admitting the seizure of the Still, or the taking up of the steam pipes, or any or all the acts complained of, to be trespasses, —still it is claimed, we have a remedy at law.

Passing, for the purposes of this part of the argument, all other matters of complaint, we confine ourselves to these points:

1st. The rules and regulations of the Commissioner, (which he has, or may make), which have the force of laws, and yet have not their promulgation, often secret, and made to govern each particular case.

2d. The powers of the Commissioner to direct the supervisors, detectives, assessors, collectors, and other officers to do the acts noted above.

3d. The powers of all revenue officers, under Sec. 33 of the Revenue Act, to compel the rectifier to produce all *assistance*, and tools and things necessary to search the premises, and to open all doors, and all boxes, packages, &c., on demand of the officers.

4th. The power of Sec. 35, delegated to all revenue officers and their posse, to break up the ground of, or near the premises, or any wall or partition, *to search*, and to break, or cut away, *any pipe*, &c. (private or not.)

Note, that these things may be constant; and the search warrant is complete, to any and every revenue officer who may, from suspicion or caprice, wish to do or command them, subject only to the control of the Commissioner in a distant city, who may command or forbid them,—all the officers being under his direct command, as military subordinates:—

And it is evident that the business, though lawful, and honestly carried on, would be so burdened by constant calls and constant searches, as to be crushed.

It also appears that the defendants Allen and Ferguson, are constantly exercising these powers, and have commanded the steam pipes, which run the concern, and were laid un-

der the supervision of the Revenue officers, to be torn up; and have dismantled the works, and so injured them, that they cánot be used; and prevent their use continually, and by their threats prevent the repair.

Under these circumstances, if we get the license, we should also have the injunction, to protect it; the officers threaten, in case Plaintiff repairs the property, that they will seize and confiscate it.

These acts of search, seizure and destruction could have no adequate remedy at law, because:

1st. The consequential damages as men being stopped, and leaving, loss of product from cooling, time necessary to repair, loss of interest,—would exceed the direct, and could not be proven; and annoyance could not be measured.

Every manufacturer knows, that it is almost impossible to stop men and machinery and start again, without loss, and takes hours, and sometimes days, to get the men good natured, and them and the machinery to running well; —and the injury, inflicted by a rule of the Commissioner followed by an officer, would be hard to weigh.

2d. The trespasses being repeated and constant, repeated suits would have to be commenced—each day, perhaps, a new one.

3d. The strongest reason, however, grows out of the case referred to: *Osborn* v. *U. S. Bank.*

If the Collector commits the trespass by command of the Commissioner, both are liable. The command of the Commissioner would not justify the subordinate, and the remedy would be joint or several.

But the Commissioner would not be the principal, though the apparent actor.

The actor is the *Government*, which commands him and all the other officers to do these acts. And the officers, having assumed the ministerial office and given out that they intend to execute these commands, and having commenced to perform them against this plaintiff, are yet merely the ministers and agents of the Government, which is, through them, the principal trespasser.

Yet, the principal is beyond the reach of law. If the Government breaks up our property, or enters, high-handed and without warrant, to search our premises, or person, no action at law can be maintained;—and, as to the pal actor, we are without remedy at law.

As to it, our only remedy is in equity, which can restrain its agents, and effectually support the right.

The doctrine of remedy against the agent being sufficient to us, in lieu of the protection against the principal, is based upon the docrine of an expiatory sacrifice, which I believe has never been borrowed into the Common Law.

But there is a difficulty in expiation, thus: the just only, can expiate the fault of the unjust; and in this, both are *in pari delictu.*

To give us a remedy at law for the trespass, we should have our action against all the trespassers; but, the Government, being the principal and joint trespasser, the principal and only really responsible actor passes beyond the power of the Courts, the instant the act is performed; and what is left is, a several and collateral action against whatever agent is accidently connected with the particular act complained of.

"Equity will always interpose, to prevent the transfer "of a specific article, which, if transferred, will be lost to "the owner," 9 Wheat; 845; and this, without reference

to the responsibility of the party, or the adequacy of the remedy at law.

" It is the province of equity, in such cases, to arrest " the injury and prevent the wrong. The remedy is more " beneficial and complete, than the law can give." (id. p. 845); and the decision of this case is, that where the principal is beyond the reach of law, the agent should be restrained.

SECTION CXVI.

Proceedings in rem for Forfeiture.

As it is tolerably clear by the Commissioner's instructions under Section 4, and by the language of Section 36, 42 et seq., that the penal provisions of the bill which they intend to prosecute, will be under other statutes by suit *in rem*, we will consider its illegality:

1. In cases of seizures *on* navigable waters, the District Court sits as a court of admiralty jurisdiction.

The Sarah, 8 Wheat., 394.

Waring v. *Clarke*, 5 How., 464.

In the trial of all cases of seizures on land, the Court sits as a court of common law.

In all cases at common law the trial must be by jury.

Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and cannot be blended.

Union Ins. Co. v. *U. S.*, 6 Wallace, 759 and 762.

The Sarah, *ante*.

U. S. v. *Hart*, 6 Wallace, 772.

Armstrong Foundry, id., 769.

St. Louis Street Foundry, id., 770.

Waring v. *Clarke*, 5 How., 466, 467.

Parsons v. *Bedford*, 3 Peters, 446, 447.

2. This trial by jury possesses certain incidents and safeguards for the innocent, no one of which can be dispensed with.

1 Gray, 37, 43, 44.

Saco v. *Wentworth*, 37 Me., 176.

(1st.) The jury must be of twelve men, chosen from the vicinage where the deed was done.

The People v. *Kennedy*, 2 Parker (C. R.), 318.

Bac. Abr. *title* Juries (A.)

Hale's Common Law, 289.

(2d.) Some person in particular must be accused,—certainty is essential.

Greene v. *Briggs*, 1 Curtis, 329, 330.

Fisher v. *McGirr*, 1 Gray, 35.

(3d.) He must have right of challenge.

(4th.) The accused is to be informed of the cause of accusation against him, and the charge must be certain and explicit.

Greene v. *Briggs*, 1 Curtis, 329, 330, 331.

Greene v. *James*, 2 Curtis, 189.

Saco v. *Wentworth*, 37 Me., 172.

Commonwealth v. *Phillips*, 16 Pick., 213, 214.

Fisher v. *McGirr*, 1 Gray, 35.

Donovan v. *Vicksburg*, 29 Miss., 247.

(5th.) The person to be punished, must have the right to answer and contest the charge, and the consequent right to be discharged from it, unless it is proved.

Greene v. *Briggs*, 1 Curtis, 326.

2 *Co. Inst.*, 50, 51.

Saco v. *Wentworth*, 37 Me., 172.

The decision by the jury is conclusive upon the parties.

Hoke v. *Henderson*, 4 Devereaux, 15.

Taylor v. *Porter*, 4 Hill, 147.

Jones v. *Perry*, 10 Yerger, 59.

3 Story on Const., 661.

3 Kent, 13, n.

1 Gray, 35, 36.

Donovan v. *Vicksburg*, 29 Miss., 247.

(6th.) The accused must be presumed to be innocent till proved to be guilty, by witnesses confronting him face to face, in the presence of the jury,

1 Gray, 36, 38 and 39,

Hale's Common Law, 289,

and this beyond all reasonable doubt.

Wasden v. *The State*, 18 Ga., 265.

The State v. *King*, 20 Ark., 167.

(7th.) No man shall be punished for an offence unless he has had a trial, and been proved to be guilty.

Greene v. *Briggs*, 1 Curtis, 311, p. 325.

1 Gray, 35 and 36.

(8th.) There must be a free and unanimous verdict.

Bac. Abr. *title* Juries (G.)

(9th.) The accused shall be tried by an impartial jury, and the fact, guilty or not guilty, shall be found by them.

Amendments to the Const., Arts. 6 and 7.

Hale's Common Law, 289.

Constitution, Art. 3, Sec. 2 (3.)

Note.—The verdict must be the free, untrammeled, honest, unanimous conviction of the twelve men, upon the full and careful hearing of all the evidence in the vicinity, and surrounded by all the circumstances, customs, habits of thought, accidents and modes of life, which make them more competent than any judge or legislature to give due weight and value to the evidence. If, upon the trial, a witness swears positively to the guilt of the accused, and the accused offers no evidence in his own behalf; if the witness exhibits malignant malice toward the accused, or from any other cause compels the twelve men to believe he tells what he does not know, or is committing willful perjury,

they cannot believe that the charge of guilt is sustained beyond a reasonable doubt. (*Hale's Common Law*, 291.)

Or, if circumstances only are proved, and they can be reasonably accounted for in a manner consistent with the innocence of the accused, they cannot but doubt, and feel that full proof has not been made. (See Sections ante.)

Can the legislature alter the power of any evidence? Can it say that, if a member of the church shall swear against a prisoner, and no witness shall be sworn in his behalf, the jury shall be satisfied that he is guilty of the charge? Or, if certain circumstances shall be proved, and no rebutting testimony given, the jury shall believe an accusation of crime sustained beyond all reasonable doubt?

Can the legislature, a thousand miles away, and years before a deed is done, weigh the evidence, and command a verdict in accordance with their judgment thereon, and yet leave perfect a man's rights to the free and impartial judgment of his equals of the vicinage?

Can it say that, if a revenue officer is killed in a distillery, it shall be *prima facie* evidence (that is, evidence which, if uncontradicted, shall be conclusive) that the distiller is guilty of murder?

If nay—is answered to any of these questions, we need go no farther; for:

3. Any statute which makes any matter, *prima facie evidence* of guilt, is void.

I know that many assertions that the legislature is competent to change the burden of proof, and prescribe what shall be *prima facie* evidence, are to be found in the books sanctioned by names of high repute. Yet, so far as I have examined, they were, as to criminal cases, obiter, and were never examined in the light in which they are now presented. Therefore, I say that no weight of precedent

can crush out the right to a free judgment; and the right must rise though it should overthrow a thousand decisions. Justice must prevail though the heavens fall.

The jury is, while sitting in a cause, part of the Judicial Department of the Government. They are the twelve judges of the fact, and the Legislature can no more usurp Judicial authority over questions of fact than over questions of law.

4. No jurisdiction can be acquired to adjudicate these forfeitures, because no process, which is the foundation of jurisdiction, is provided by the statute.

Greene v. *Briggs*, 1 Curtis, 335.

Fisher v. *McGirr*, 1 Gray, 37, 38, 39, 40.

(Observe that in *Fisher* v. *McGirr*, no person had been fined, but the proceeding was for the forfeiture alone, and this was trespass against the officer who took the forfeiture.)

The federal courts can exercise no criminal jurisdiction which is not given by statute, nor punish any acts criminally, except as the statute provides.

U. S. v. *Lancaster*, 2 McLean, 433.

Anonymous, 1 Wash. C. C. R. 84.

Ex parte Dorr, 3. How. 105.

Ex parte Bolman &c., 4 Cranch, 93 and 94.

U. S. v. *Hudson & Goodwin*, 7 Cranch, 32, p. 34.

U. S. v. *Coolidge, &c*, 1 Wheat. 415.

5. As this prosecution is penal, and the statute, under which it is had, does not prescribe the precautions required by the Constitution for the safety of the innocent, no adoption of such precautions can justify a judgment under the law.

Commonwealth v. *Albro*, 1 Gray, 49.

6. A proceeding *in rem*, in Courts of Common Law, cannot be had unless there is a *jus in re*.

I am obliged to pass this point without discussion, because I have not had time to collate the authorities and prepare the arguments hereon, simply noting, however, that, in Hale's Analysis, sec. 7, the author, under the head of the Royal Revenue, mentions that of which the law takes notice as of common right, belonging to him because he is King, viz: a tun of wine out of every ship, custom, &c., &c.

And this right it is decided in *Murray's Lessees* v. *Hoboken Land Co.*, 18 How. 272, may be submitted to the courts for judicial determination, if the Legislative powers chose so to do. And thus, in tax cases, the seizure, by prerogative, is sometimes submitted to the courts, by a proceeding *in rem*, to decide whether the prerogative has been properly exercised—before the debt is made from the seizure.

7. On a criminal prosecution, the lands or goods of the accused cannot be seized before judgment. Nor can any portion thereof be granted or promised to any.

MAGNA CHARTA, ch. 29.

The first thing to be done, in order to bring a criminal to justice is, to arrest him.

2 HAWKINS, (P. C.) (Analysis, p. 1)

Commissions to seize the goods and imprison the bodies of all persons who shall be notoriously suspected of felonies or trespass, without any indictment or other legal process against them, are illegal and void. 2 Hawkins, 2 (S. 6 and 7.)

There is a very grave question, which presents itself in connection herewith.

The Government cannot seize, from a citizen, anything but its own;—this is the limit of its prerogative. It seized

the property, not as a tax, not as a debt, but as a forfeiture, —and from the outset granted a portion of the forfeiture to a subject, on condition of conviction and complete divestiture.

And this question is: Is the grand chapter of the Grand Charter a dead letter?

Have Acts of Parliament, against this ancient and fundamental law, and in the face thereof, by color of which Acts it is not credible what horrible oppressions and exactions to the undoing of infinite numbers of people, by Empson and Dudley and others;—have breaches of the contract by one of the contracting parties,—abrogated this compact and charter?

If English precedents are authority for any of these things, then the answer is affirmative; if not,—the Grand Charter did name the rights reserved to the people at the time they framed the Constitution,—

And, saying: "no man shall be in any manner destroyed," *did* intend that all things, by any manner of means tending to destruction, are prohibited.

As: If a man be accused, his lands or goods cannot be granted to any, no,—not so much as by promise,—nor any of his lands or goods seized before attainder; for, when a subject attaineth a promise of forfeiture, many times undue means and more violent prosecution is used, for private lucre, tending to destruction, than the quiet and just proceeding of law would permit; and the party ought to live of his own until attainder or conviction.

2. Co. Inst. p. 45 to 56.

If this was the law at the time the Constitution was framed, can violations alter it? Can wrong make right? Can right, so precious in the eye of the law, that it never

can be destroyed,—trodden down it may be, it can never be trodden out (Co. Litt.)—Can it be extinguished by mere brute force?

Yet, the attempts are few and scattering, and the cases small, so that the importance of the matter has never been examined, and the questions, so far as I can find, never raised :—Are we not, then, remitted to the text, and the construction, and required now to decide the solemn question :—whether Magna Charta is a living reality, or a dismal shadow?

8. This is a criminal prosecution.

This is a suit to deprive owners of their property, for forfeiture; implies that there is some title to be divested, something which, until forfeiture, had an owner.

Greene v. *Briggs*, 1 Curtis, 329.

It is a criminal prosecution, for, it is a proceeding to forfeit property for violation of a statute.

Greene v. *Briggs*, 1 Curtis, 331.

Armstrong Foundry, 6 Wallace, 769.

St. Louis Street Foundry, 6 Wallace, 770.

It is to enforce obedience by punishing the offender, and this it does by depriving the owner of his property, and at the same time preventing further unlawful use of it.

Being highly penal in its operation and consequences, it should be surrounded with all the safeguards, necessary to the security of the innocent.

Fisher v. *McGirr*, 1 Gray 35.

Commonwealth v. *Albro*, 1 Gray, 35.

Fetter v. *Witt*, 46 Pa. 460.

A crime is, an act which violates a law, divine or human (Webster). The first are crimes in themselves; the second are crimes, because prohibited.

Without the Statute, it would not be a crime; with the statute, it may be.

The prerogative is exerted in laying the tax; the owner then owes the debt, and if any proceedings are had against him, civilly, they are for this debt; but this proceeding is not for the debt owed, but for the forfeitures incurred.

Therefore, for this disobedience to and infraction of the public law, the property of a citizen has been seized, and this prosecution commenced.

And we are not without authority here, as to whether this penalty is liquidated damages, or a duty or tax laid.

Anglea v. *The Commonwealth*, 10 Grattan, 700.

Madin v. *Wilson*, 21 Ala., 670.

McLean v. *U. S.*, 6 Peters, 404.

The informer has no vested rights: the Government gives part as a bounty.

It cannot be possible, then, to view this prosecution for forfeiture as any other than penal, to divest the owner of his property, and thus punish him for the violation of the law.

9. The statute gives no jurisdiction to adjudge a forfeiture and divest the owner.

It does not provide any process against any person; but requires a seizure of the property, without oath, and without charge against any person.

It does not provide for a jury trial, but, on the contrary, deprives the jury of an essential attribute of their judgment.

It grants a moiety of the goods of the accused to an informer, by promise, conditioned only that he shall obtain conviction.

This is a prosecution to punish crime: No person is

charged, though the owner is to be punished,—no crime is charged to have been committed.

As no person is charged, no one can be informed of the nature of the accusation.

No place or opportunity is fixed, by the Act, for trial,—therefore, no witnesses can be confronted.

This provides for no trial; it is the exertion of prerogative; and, if the Courts interfere, they come in without authority.

We have seen that the Government can take its own, from a citizen by its bare executive Warrant: What right, then, have the Courts to interfere, and say another mode must be prescribed?

But if it does not take it by prerogative, and attempts to punish crime, in the taking, all the provisions of Art. 6 of the Amendments must be provided for.—They are not. Therefore, under the principles and precedents of *Fisher* v. *McGirr*, and *Commonwealth* v. *Albro*, 1 Gray, 1: the Act, as authorizing a criminal prosecution, is void.

The Court may, as a matter of grace, grant a day in Court, &c., &c.; it is not required by law to do so,—it may direct its Marshal to notify all parties in interest. Yet its record under the Statute, is complete without it.

And all proceedings *in rem*, to punish crime, are trespasses, forbidden by the letter and spirit of the Constitution.

As the case of *Murray's Lessees* v. *Hoboken Land Co.*, 18 How., 272, has been referred to, to justify the exercise of tremendous powers touching taxes, I wish concisely to digest its reasons and principles.

(p. 275.) 1st. If auditing the account and ascertaining

its balance, and issuing the distress warrant, was an exercise of the judicial power, the proceeding was void.

(p. 282.) 2d. Few Governments do, or can, permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy.

The Barons of the Exchequer exercise no judicial power in auditing accounts. The Exchequer includes two distinct organizations—one is ministerial, in charge of the revenues, the other is a Judicial Court.

(p. 277.) 3d. Magna Charta provides: "We or our "bailiffs shall not seize any land or rents for any debts, "as long as the present goods and chattels of the debtor "do suffice, and the debtor be ready to satisfy therefor,"—implying that the King reserved the right to strike a balance and seize the goods, &c., to satisfy it.

4th. In conformity therewith, a conditional Writ was framed, commanding the Sheriff to inquire of the goods and chattels of the debtor, and, if they were insufficient, then to extend on the lands.

After 33 Henry VIII. the Writ was issued in its absolute form.

p. 277 and 278. 5th. To authorize a Writ of extent, the debt must be recorded in the King's Exchequer.

p. 278. 6th. The method of ascertaining the existence and amount of balances due from receivers of the revenue, in England, and compelling their payment, have varied widely from the usual course of the Common Law on other subjects; and as to them "the law of the land" authorized the employment of auditors, an inquisition without notice, and a summary execution.

7th. This diversity in "the law of the land" between public defaulters and ordinary debtors, was understood in

this country, and practised in the colonies before, and in the States after the Declaration of Independence, and before the Constitution.

p. 281. 8th. The subject matter, *i. e.* striking a balance, is not necessarily a judicial act.

p. 276. 9th. It was not left with the Legislative power to enact any process which might be devised; but if the proceeding does not conflict with the Constitution, and is found in those modes of proceeding existing in the common and statute Laws of England before the emigration of our ancestors, and used by them here, it may be enacted.

p. 285. 10th. The writ of extent, called, in the act of 1820, a warrant of distress, summary proceedings for ascertaining (p. 280) the balance due the Government from a revenue (p. 281) collector, and process, in its nature final, against (p. 286) the body, land and goods of persons who have possession of the public money, are due process of law.

p. 284. 11th. Congress cannot withdraw from judicial cognizance any matter, which, from its nature, is the subject of a suit at the Common Law, or in Equity, or Admiralty, nor, on the other hand, can it bring under the judicial power any matter, which, from its nature, is not a subject for judicial determination.

This is the extent of the purview of this decision; and the exercise of this tremendous power is only justified because: expressly reserved in Magna Charta, and constantly exercised on both sides of the water, down to the framing of the Constitution.

It was because the Government has an absolute right in the person, and possessions of the person, acting as its fiduciary agent, a *jus in re*, by immemorial prescription.

SECTION CXVII.

MANDAMUS.

Upon this head, the first question raised, is, that it is a Common Law remedy. But the Mayor of Coventry's case, 2 Salkeld, 429, states the practice in *Mandamus out of Chancery*, and shows conclusively that this objection is not well taken.

Mandamus is a very ancient judicial power.

Tapping's Mandamus.

It is dispensed in all cases where there is a legal right to justice, but for which right the law has not provided any specific legal remedy.

Tapping, on Mandamus, (marginal p. 3.)

R. v. *Dublin* 8 Mod. 29.

Of late years our writ has been liberally interposed for the benefit of the subject and the advancement of justice. (Ibid.)

This seems to be an equitable remedy, and is part of the great judicial power which is vested, not by Congress, but by the Constitution in the supreme Court, and such inferior Courts as Congress may have ordained and established.

It may not be strictly regular to add the prayer for mandamus to a prayer for relief. If so, a special demurrer would have excised it. But, I think it is one of those cases where the Court, having attained jurisdiction for the injunction, will proceed to administer complete justice between the parties.

A special demurrer is necessary, to take advantage of matters of form, and a general demurrer admits the form to be sufficient, but denies the substantial right to any relief upon the facts as stated, or the power of the Court to

grant such relief. And it is understood, in this case, that the defendants, represented and protected by the United States' Attorney, furnished by the Government, stand upon two propositions, viz:

(1.) The Circuit Court had no power to issue a mandamus, to compel the performance of a duty by a ministerial officer of the United States.

(2.) The Plaintiff is not entitled to pay the tax on this rectifying house, and to have the necessary preliminary steps taken by the Assessor, and the necessary receipt or license, therefor, issued by the Collector.

The alternative Writ is always granted where a prima facie case of right is made out, and, on the return, the matter is tried.

Tapping, on Mandamus.

And, notwithstanding the officer may be liable to an action on the case, for neglect of duty,—he may be compelled, by mandamus, to exercise his functions according to law.

Moses, on Mandamus, 108.

McCullough v. *Mayor of Brooklyn*, 23 Wend., 458.

Moses, on Mandamus, p. 108, states a principle, which is applicable not only to this motion for mandamus, but also to the motion for injunction, and the entire case.

In all cases, where there is a legal right to justice, but for which right the law has not provided any specific legal remedy, a remedy is dispensed by the judicial power of the State, either by mandate, commanding: or injunction: forbidding.

Tapping, on Mandamus, (marginal p. 3.)

Rex v. *Dublin* 8 Mod., 29.

In the case at bar, the plaintiff desired, and believed he had a right—to pay a tax, of two hundred dollars, as a rec-

tifier, under Section 59 of the Act of July 20, and asked a Mandamus, to try this right. He had an interest in making the payment, because, if he shall exercise his right to be a rectifier, without paying, he is liable to a penalty, not for being a rectifier, but for not paying the tax. He must pay, or he cannot put up the sign required in Section 18. And, preventing his use of the sign, effectually destroys his franchise and right to be a rectifier; for, every person who shall work in, or carry, or deliver anything to or from his establishment, is made liable to indictment and severe penalties; and he, with his right, is as much a fugitive and a vagabond on the face of the earth, as if the brand was on his forehead.

Without having paid this tax, he cannot have his product guaged, inspected or stamped for removal, under Section 25; and, if the provisions of Section 25 are not complied with, the spirits will be forfeited, under Section 36, and will be seized by the officers under control of the defendants; for they have the power, and threaten, to execute this Act; and such seizure is evidence conclusive, from the necessities in this case, under Section 36, that the spirits are forfeited.

It would seem that, if there ever was such a case, as that mentioned by Lord Mansfield (3 Burr, 1266), and quoted by this Court: "where there is a right to perform "a service," which "the Court ought to assist by Manda- "mus, upon reasons of justice,"—the right to pay this tax, whose neglect, whether willful, or compelled by the mere perversity of the officers, is necessarily followed by the dire and unrelenting persecutions of the Sections named, —must be such an one.

Had the Circuit Court the power to issue the writ? The reply of *Marbury* v. *Madison* is affirmative.

This power, in some form, may be exercised over the present case, because the right claimed, arises under the law of the United States; and the right to a legal remedy, by suit or action at law, wherever a right is invaded, is reserved to the people, and not disparaged by the Constitution.

The whole judicial power of the United States is vested in the Supreme Court, and such Inferior Courts as Congress has established.

In the distribution of power, this is given to the Courts of original jurisdiction. The Supreme Court, in this instance, is not a Court of original jurisdiction; the Circuit Court is.

The power exists,—may be exercised,—is vested some where. It is not vested in any but the Circuit Court. Therefore, it must exist in, and may be exercised by it.

SECTION CXVIII.

Though questions of policy do not properly belong to the judicial consideration of any case,—in view of the fact that revenue must be raised for the support of the Government, and, to show the Court that my criticisms have not arisen from any fault-finding spirit, I will proceed to show the proper plan for raising internal revenue:

In my own State, I have never contested a tax, or an assessment, without adopting the rule of a plea in abatement, and giving a better action, except where the whole matter was radically and irretrievably wrong; which course has gained respect to my position, and added weight to the arguments presented.

I will answer the popular and official demand: How can you get a revenue, if you cannot make it effectual in this manner?—and, will answer, also, the position, often impatiently pressed, that in Europe, and in England especially, persons in these trades receive little consideration, and are very summarily dealt with by the Government.

It is to be remembered that all men are equal in the eye of the law, in this country; and a precedent, established against a distiller, fixes a principle that shall control every man.

Certainly the manufacture of alcohol, which is a necessity in mechanics, is not worse than breeding, buying, selling and owning men.

Yet, not long since, that "peculiar institution," under which a father might sell his own child, was the distinguishing feature of thirteen States and nearly eight millions of people.

Nor is the trade more odious than was, a few years since, the manufacture and vending of the world's vanities, in the opinion of a large number of the sect of "Friends." Yet, it would, to-day, hardly be justifiable, to place all milliners, tailors and dry goods merchants, outside of the protection, due to other citizens.

All are citizens, equal, and with equal rights to acquire property in the free exercise of such trades, as are sanctioned and approved by their respective States:—to all, the same rules, precedents and principles must apply.

It is a fundamental principle in the construction of Constitutions: that it is unlawful to impute useless or frivolous conduct to the whole people in their enactment; and that the fundamental law, they have made, must be obeyed, by rulers and people.

Growing out of this, is the necessary inference, that the people have considered that, which they have commanded; and nothing, so commanded, is impossible.

The business experience of almost every man, and of almost every large enterprise, have uniformly taught, that those things, which, at first, seem impossible, can be accomplished by steady, patient, honest, thoughtful efforts, persevered in without compromise.

And more than one statesman has written, that paper Constitutions are of no value, if their obligations are relaxed in any particular, and precedents for their violation established.

Municipal governments are very much like men:

The child of wealth, under the eye of assisting, but fearful and indulgent parents, cannot study hard, for, it would destroy his eyes; it is impossible for him to lift or labor, from some opposing cause; and thus, growing incompetent, he disappoints his parents' fond ambition, and is a failure as a

man: While another, by his side,—weak, and at first inferior, perhaps,—undertakes the tasks; necessity compels him to succeed or die. If he succeeds, he will be *a man;* if the labor and peril destroy him, others will take his place.

And so it is with municipal Government: If it yields to the supposed necessities, it *will be a failure*, and prove worse than worthless. But, if, being tried, it is not found wanting,—*it will be a success*, and not only an honor, but a shield of power and a defence to every one of the constituent parts.

Such is the principle to govern all cases.—But in this case we meet few obstacles, against which it must be invoked.

We have seen, in the case of *Chisholm* v. *Georgia* (2 Dal., 462), that, taking Blackstone's description, the Government of England is a despotism,—that of a nation, whose people have no place,—whose estates alone are regarded as worthy of authority.

And it is too well authenticated to be denied, that less than 200,000 land-owners control the British nation, and form its entire Government.

The reform movements of late years have shown the fact that nineteen-twentieths of that nation are not, and never have been, represented in the State. And the land-owners and capitalists have, from generation to generation, studied the art, not only of keeping up the power of their *families* to live upon others, but also to make those others bear all the burdens of the State; and they have in a great measure succeeded. Yet, we are pointed to England's precedents as examples worthy of our imitation.

Those who have sought such precedents, must have forgotten that the immediate cause of Lexington and Bunker

Hill was an attempt to introduce that system of taxation, —and the first and fundamental step in the Nation's Constitution, was the destruction of the British system of class privilege, and the declaration to the world as a reason for revolt, that *all men* are born free and *equal :* of right equal before the law, not only as to life and liberty, but as to their property also, its acquisition, burdens and protection.

Pursuing the same dissent from the British system, the people, in two different places declared their rule:

1st. Representatives and direct taxes shall be apportioned according to the numbers, so that the privileged aristocracy shall pay, above the common freemen, just in proportion to their privileges. (Const. Art. 1, S. 2, 3.)

2d. No direct tax shall be laid in any other manner. (Art. 1, S. 9, 3).

The people further laid down the rule, that all duties, imposts and excises (that is : all indirect taxes) shall be uniform throughout the United States. (Art. 1, S. 8, 1).

How this system was to be carried out, they did not know ; for they could not look to the experience of any other nation to guide them.

Indeed, this was the precise position of the Court in the case of *Hylton* v. *The United States*, (2 Dal. 179), in which it was declared that we were without a precedent, and that the experience and necessities of the country would build up a safe and correct system upon the new principles.

We must seek our precedents, then, not in England or Europe, but in our own country, where thirty-seven States have studied and practiced the principles,—some of them, for nearly a century.

The experience of every State in the Union seems to

have taught, that the best way to raise revenue, is, to make those, who have property, pay.

Taxation, uniformly proportioned upon the value of all the property within the jurisdiction of the body imposing the same, has been the rule, fixed in many State Constitutions, in terms; and in all the States, the universal assent of the people, as well as theories of very high authority, have pronounced it the most just: for, from this source most of the State revenues are derived.

Its justice cannot be gain-said; for, the theory of taxation is, that the citizen is bound to contribute of his means, in return for the protection which he enjoys.

Now, every man can, and does contribute moral and physical force for the protection and welfare of the whole, as called upon, and just in proportion to his ability. And if a man has nothing but himself and family to protect, he has contributed his proportion when he has given his moral and physical power, as called upon. If, however, he has property to be protected, he must do more; his moral and physical contributions are but proportioned to his personal protection;—if his property is to be protected, that too must contribute in proportion to its value.

Following the same rule of uniform justice, special taxes, called by various names, have been laid upon such kinds of business as require more than the ordinary care and protection, or cause greater expenses to the State: Drinking and gaming houses, shows, pedlers, public hacks and many other things, have been regularly taxed, either to pay the special expenses they cause, or to carry out, by the very act, some necessary regulation of the internal government and police of the State. Special taxes have also been laid to cause some improvement for local benefit.

And throughout all the States, the principle of uniform equity has become the governing principle.

This is the only principle consistent with the Democracy and honesty of a people, the corner stone of whose system is, that all men are born, not only free, but equal in the eye of the law.

Aristocracy follows a different rule:

England raises her revenue from excise, and special taxes,—and why?—Because all men are not equal;—because the land-owners make all the laws.

The House of Lords sits to protect its prerogatives from disparagement, and its lands from burdens; and the House of Commons, so called, consists of very few but great land-owners, and they bind heavy burdens and grievous to be borne, and lay them on other mens shoulders, but they, themselves, will not move them with one of their fingers.

They lay taxes on light, and excises on everything they can discover in the hands of other men, and then—give away the revenues in pensions,—not to the soldiers who have fought their battles, nor to the factory hands and miners, who, having fabricated or dug out the nation's wealth, have become disabled, and are poor and suffering;—they give the revenues to worthless aristocrats, and to a few, who have happened to win applause.

The reform needed in our National taxation, is radical.

In the attempt to follow the aristocracy of Europe, a system has been inaugurated, which violates every rule of constitutional provision, and every principle of equal justice,—a system—for the maintenance of which, spies and secret star chamber Courts of inquisition,—unprecedented power to a horde of roving officers, and destruction to the power of the Courts to protect the citizen,—have all be-

come necessary. And, further, in a populous city (Brooklyn), military force was used, a few weeks since, to destroy the property of citizens, suspected only, of defrauding, but never charged with any crime, and they, reduced from affluence to beggary, without redress. And monthly we hear of cavalry raids through the South, to destroy what, by the laws of the United States, is acknowledged to be a legitimate and rightful trade and lawful property,—without warrant or process of law.

The whole system of to-day is intended, it is said to reach the consumer; and the poor consumer, who has nothing, and can barely get enough to consume to keep him from wasting by cold and hunger, must bear the burden, while capital goes free:—Industry, enterprise and poverty—all pay. Capital sits protected, and pays—nothing.

Such is the general system,—one special feature in which: a tax is attempted to be laid on land which marks the lack of statesmanship, of study and almost of common sense for which the system is in every part distinguished. The feature is "a direct tax on land" of twenty millions annually; whereby a land tax is apportioned upon the States in proportion to the census and without regard to uniformity—in direct violation of the Constitution.

We have seen that all taxes are either laid on persons, or property: That a direct tax is laid upon the person, without the intervention of property, and an indirect tax reaches the person only through his ownership of property which is taxed. (Sec. 59 and 61, ante; pp. 197 and 205.)

We have seen how taxes, laid upon real and personal property can reach the owners, and be, in fact, indirectly their quota and contribution to the support of the State, though

they may be aliens, on the opposite side of the globe, or infants of a day.

We have seen, in *Gibbons* v. *Ogden* (id.), that taxation is but the taking of small portions from a continually accumulating, or—more correctly—from an existing mass: tallagium, from *tailler*, to cut. A capitation tax refers to no mass, but is direct upon the man. Now, if an impost, laid on a mass of land, is a direct tax on the land, any other impost or excise, laid on any other perpetually accumulating or existing mass, is a direct tax on that mass; and the Constitution is inconsistent with itself, and has forbidden the impost to be laid according to the rule it has commanded.

Seventy-four years since, a judge made the remark that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is a direct tax. (*Hylton* v. *U. S.*)

This remark, and others of the same purport in that case, were as purely and completely *obiter* and accidental, as any remark which has ever found its way into a decision; and, for three quarters of a century, no one has ever discovered a single element of a direct tax in a tax on land. On the contrary, the new States, desiring the capital of the East and of foreign nations, have taken away all disabilities, and promoted foreign pledges and ownership. And these States, now taxing the lands and personal property within their territorial limits, collect their revenue indirectly from the citizens of every Eastern State, and almost every nation of the Old World.

From the wonderful diversity and complexity of estates in land, it is evident that a tax upon it must possess more elements of indirect taxation upon the persons, who are bound to pay taxes to preserve their ownership, than any other impost that could be imposed by Government.

The land itself needs no protection,—it will stay; society has even ignored its area, and fixed its value primarily from its uses; the ownerships in, and additions and attributes given by society, are the only things to be protected by society.

This being true, there is no reason why the rule of taxation, indicated by the law of nature and the experience of the States, should not be adopted as the system of the nation:—

A system which,—in the older States,—has proved, not only simple and adequate, but also capable of being divested of all harsh features, and exercised in accordance with the fundamental principle: that the object of society is the security and good of every individual.

SECTION CXIX.

CONCLUSION.

The theory of the case is, that all restrictions of Congress, on the right of a citizen, within the country, to acquire, possess, protect and enjoy property, are unwarranted; —all embarrassments of that right; all prohibitions upon the courts, forbidding them to protect it; all requirements that a man shall furnish evidence against himself; all delegations of legislative power by Congress, and all special tribunals,—are infringements of the liberty and deprivation of the property of the citizen without due process of law.

That, if the exigency is so urgent that time cannot be had to obtain protection of the law, a man may take the law into his own hands and protect himself; but, if there is time, he must apply for protection to the courts, whose duty it is to extend that protection,—fully, so as to ward off all oppressions,—promptly, so that it may be full, and he not remitted, for a moment, to his own defence,—freely and without denial, so that, when the law, through the courts, shall say: "*vindicata est mihi*," it may speak truly, and all may respect its voice.

We have found, that:—

1. The judicial power of the United States extends to all cases, arising under the Constitution and laws of the United States.

2. The whole judicial power of the United States has been vested, by the Constitution, in the judicial department of the Government, consisting of one supreme Court and such Courts, inferior thereto, as Congress has, from time to time, ordained and established.

3. Original jurisdiction in all cases in Chancery, is thus vested in the Circuit Courts, except where original jurisdiction is given, by the Constitution, to the supreme Court.

4. The Constitution is a law for rulers and people, and covers, with the mantle of its protection, *all men*, under all circumstances. And all men may, always, find complete protection in the laws, by suit or action.

5. Any man has a clear and undeniable right to acquire leasehold or other property, and to use it for distilling rectifying, manufacture or merchandise, or *all of them, together*, to acquire, possess and freely and fully to enjoy his property, *subject only* to regulation by the State Government.

6. Though a bill will not lie to restrain the Courts from criminal proceedings, a man has a right to protection from a series of malicious or unfounded prosecutions and other destructive trespasses.

7. If, to administer complete justice, it is necessary that the judicial power of the United States shall, not only forbid the executive officers to commit the trespasses, but also to annul the warrant under which they are proceeding, the judicial department, enforcing the Constitution, and administering justice thereunder, *must* dispense the remedy, *adequate to undo the wrong, and render justice, unbated and complete.*

8. Every citizen ought to find a certain remedy, by having recourse to the laws, for *all* injuries to person, property or character,—FREELY—COMPLETELY—PROMPTLY.

An end of government is, to furnish the individuals who compose it, with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life.

This end may not be sacrificed through the means; and

the fact that a case is without precedent, in the dignity of the actors, and the solemnity and character of their action, is an imperative reason, requiring the judicial department to find the means, and preserve the object for which it was established.

Being a new wrong, it may require a new remedy.

Being a great wrong, it may require a great remedy.

Committed by actors of great dignity and power, with great solemnity,—it may require all the dignity and power of the Courts, for its remedy; but, remedied it must be; or the Government is so far a mistake and a failure.

9. In the case at bar, we find a void statute, whose existence is a constant cloud, divesting the plaintiff's freehold and destroying his livelihood:—officers having the power, and threatening to execute this statute;—the Commissioners putting their constructions and amendments upon the statute, and commanding their execution:—the officers executing the Act and the Commissioners' commands, seizing and dismantling the plaintiff's property, and, by their constant compulsion and threats of seizures, confiscations and prosecutions, utterly destroying the plaintiff's property and means of livelihood.

For this, Chancery can afford a prompt, complete and adequate remedy,—more prompt, more adequate and more complete, than any remedy at law can be.

A remedy at law could only be obtained by a multiplicity of suits against many persons, some unknown and some irresponsible. This remedy would also be dilatory and distant; and, as it is uncertain, so, also, it would be inadequate—for, it could not restore the livelihood, which is being taken away,—and incomplete, for, it could not compensate consequential damages.—Therefore, it is a case of Chancery Jurisdiction; and the remedy, to be complete,

must be such as Chancery alone can give for constant, harassing trespasses and destruction.

The Bills were dismissed for want of equity, though the plaintiff's case was one of a clear right to every item of relief prayed therein.

A CITIZEN PRAYS JUSTICE:—shall he be denied, because of the dignity of his oppressors?

He asks *complete* justice;—*shall he be put off with a partial remedy*, because of the complicated and extensive character of his injuries?

He asked prompt relief;—was he not wronged, and the Constitution violated, when his remedy was delayed and his prayer refused?

He asked a Mandamus,—is it not his right?

He asked an Injunction,—is it not guarantied by the Constitution?

He asked—and now insists—that *every line* of the statute, which he has marked as void,—as well those which affect his barrels and shipments or injure his commerce, as those which destroy his property and reduce him to involuntary servitude,—be declared void.

Chancery has acquired Jurisdiction and will administer complete relief.

With clean hands, he comes: He has not taken the law into his own hands, nor nullified a letter, by personal resistance. And, doing and ready to do his full duty as a citizen, *he invokes the whole judicial power of the United States*, in which alone reposes the power to declare that, by the PEOPLE of the United States the oppressions have been forbidden and the Act annulled.

Edward Roby
Counsel for Appellant

APPENDIX.

Stating part of Bill.

To the Judges of the Circuit Court of the United States for the Northern District of Illinois.

Lemuel W. Mason, of Clintonville, in the County of Kane and State of Illinois, and a citizen of the State of Illinois, brings this his Bill against

Edward A. Rollins, of Washington, in the District of Columbia, and a citizen of the State of , Commissioner of the Internal Revenue, and

William B. Allen, Collector, and

Duncan Ferguson, Assessor, residents of and citizens of said State of Illinois; and thereupon your orator complains and says, that your orator is the owner of a term of years, in a certain tract or parcel of land, situate in the county of Kane and State of Illinois, in the Northern District of Illinois, which is known and more particularly described as follows, viz: * * * * * together with the Alcohol house situate thereon, and all the appurtenances, and steam and other pipes connected therewith; and the right, freely and fully to use all said premises and property for the full term of three years, commencing on the first day of September, A. D. 1868, and ending on the first day of September, A. D. 1871, conditioned only, upon your orator's paying the rents and performing the covenants entered into and agreed to be paid by him in and by his lease thereof.

And your orator further shows, that in and by a certain Indenture of Lease, *bearing date the 1st day of July, A. D.*

1868, were leased to your orator, on that day, all of the said land and premises, with the Alcohol house situate thereon, with the appurtenances and pipes therewith connected, *and with the use of steam, to be supplied from the steam boilers of the distillery, adjacent thereto, for the purpose of carrying on said Alcohol house and running the machinery, now on said premises, or to be placed thereon by your orator, and the Alcohol still, now on said premises, and any other stills which your orator may place thereon,* To have and to hold all the said premises, property and appurtenances unto your orator, his executors, administrators and assigns, from the first day of September, A. D. 1868, during and until the first day of September, A. D. 1871, yielding possession and paying rent therefor, as hereinafter stated.

And, in and by said lease, in consideration of the leasing aforesaid, your orator covenanted, under his hand and seal, to pay, as rent for the said premises, privileges and property, *the sum of Five Thousand Dollars per annum*, and to leave upon said premises, at the expiration of said lease, all machinery, stills and other improvements which your orator may place thereon; which rent was, by the terms of said lease, made payable, and your orator did therein and thereby agree to pay the same, quarterly at the end of each quarter,—and is now liable to pay the same at the times when it shall become due, as aforesaid.

And your Orator further says that he, your Orator, is by trade, a distiller and rectifier, and has attained skill and experience therein by great labor and application; that he is poor and dependent upon his skill and labor for his support;—that he leased said premises and property and appurtenances for the purpose of using the same as a rectifying establishment, *and such other business as he*

might deem profitable to be carried on thereon ;—and that he intended to gain his livelihood, together with the means to pay said rents, for which he is bound, from the profits of rectifying and distilling, to be carried on upon said premises, by him, as aforesaid ; and that he has very little property, and by no means sufficient to carry on such business as aforesaid ; *and that he intended and desired to obtain credit, and to pledge as security therefor*, his goods and chattels and stock, and other property, to be by him used in and about his said business and upon said premises.

And your Orator further says, that, on the opposite side of the street from said premises, and 200 feet distant therefrom, is the distillery above mentioned, which distillery is licensed and running ; and that the most distant boundary of your Orator's said premises is distant less than 400 feet from said distillery.

And your Orator further shows that the Congress of the United States did enact and pass a statute, entitled : "AN "ACT *imposing taxes on distilled spirits, tobacco, and for* "*other purposes*, which was approved July 20th, A. D. 1868,—*a printed copy of which Act is annexed to this Bill, as a part thereof* (the sections of this Act have been recited in the argument), wherein and whereby divers weighty and grievous oppressions were enacted, to the destruction of your Orator, *divesting* him of his rights in the said property, *and forbidding any use thereof in the manner in which it was intended to be used*, or for any purpose for which it was intended to be used, and especially requiring any person who shall carry on the business of a distiller, rectifier, or manufacturer of stills, to give a bond to the United States, with sureties in a great sum, before he may enter upon said business,—*which bond your Orator is unable to give or procure ; nor can he own his said land in*

fee, free from all incumbrances, nor his said chattels; nor is he able to own any larger or other estate therein, than as above set forth. And said statute doth otherwise oppress your Orator, in that *it forbids* the use of any distillery or rectifying establishment within 600 feet of any licensed distillery;—and *doth authorize and allow* the Commissioner of the Internal Revenue to prescribe rules and *regulations for the government of persons*, engaged in the vocations mentioned therein;—and *doth permit* the Assessor and Collector of the district, *to control many of the acts of such persons* engaged in said vocations; *and doth empower said officers, and many others, who are not officers of the peace*, whose names are to your Orator unknown, but who are described in said Act as Supervisors, Guagers, Detectives, Storekeepers and divers other designations, to trespass upon *and search and seize the property*, described and mentioned in said Act, *without warrant* or color of authority, save as in said Act contained, *and to command and compel all persons* engaged in the vocations aforesaid, *and their servants;* and to do divers other outrages and unwarrantable and tyrannical acts; *and many other great and grievous oppressions and unwarrantable usurpations are in said Act contained, as by the said Act itself doth fully appear.* By reason whereof your Orator saith, that all said Act is unconstitutional, null and void, save only in those parts, laying taxes and excises, and requiring payment thereof, and those parts repealing other statutes.

And said Congress did also enact another statute, entitled: "An Act to exempt certain manufacturers from "internal tax, and for other purposes," which was approved March 31, 1868,—a printed copy of *which act is hereto annexed as part of this Bill.* And your Orator says that

Sections 5 and 7 of said last named act, are unconstitutional, null and void.

And your Orator further shows that the defendant Rollins, as Commissioner of the Internal Revenue, mentioned in said Acts, and by color of said Acts and divers other Acts, alike unconstitutional and void, *hath issued divers rules and regulations and instructions* to the said defendants Allen and Ferguson, and to divers other revenue officers, commanding them to do many acts, inconsistent with the liberty of your Orator and with his rights in and about the premises and vocations aforesaid; and *also* divers *rules and regulations and prescriptions for the government of persons, who shall pursue said vocations, and for the government and control of their property*;—all which rules, regulations and prescriptions and instructions are usurpations, unwarranted, null and void. *Many of them*, your Orator believes, *are secret*, and he is unable to ascertain what they are; *a portion* thereof he hath obtained, *and printed copies thereof are hereto annexed as part of this Bill.*

And your Orator further says that he is informed and believes that the defendants, and all other said Revenue Officers, do intend to obey said Acts of Congress and the rules, instructions, regulations and prescriptions of said Commissioner, and, in case your Orator, or his assigns, shall in any manner exercise their rights in contravention thereof, *threaten him and his property to seize, prosecute and destroy.*

And your Orator says, that, *by reason* of the penalties imposed by said Acts, *he dares not* do anything, whatsoever, to obtain any income from his said property; and, by reason of all the unconstitutional provisions of said Acts, *and the threatened doings* of said defendants and others,

under color of said *Acts*, your Orator *cannot obtain the service of any person* to assist him about his said business, *or any other he may undertake upon said premises in connection therewith.* And he cannot rent or sell his said interest, nor in any manner obtain any return therefrom; *but that his property therein is wholly destroyed.*

And, unless the Injunction, which is herein prayed, be granted immediately, great and irreparable injury will be done to your Orator, in this, that he will become bankrupt and be compelled to lose all his property of every kind;—that his business credit will be destroyed; his skill and secrets in and about his art, trade and mystery taken away from him and published; his profits utterly lost, and even his means of livelihood and present support will be imperilled; and divers other things, tending to the utter destruction of your Orator, will obtain.

And your Orator says, that no person will be accountable to him in damages, by reason of said destruction, save only for the immediate effect of corporal trespasses; therefore, he says, he has no remedy or redress, whatever, at law, for these, his wrongs.

And your Orator further says, that he is ready and willing to pay all taxes and excises, which are or may become due from him, in good faith, as soon as the same are levied, or in any manner become due.

Amendments to Stating part.

After the 10th day of September, and before the filing of said Bill, the defendants Allen and Ferguson, and divers other persons, under and in pursuance of their direction, have, separately and together, at divers times, en-

tered upon the lands, premises and Alcohol house of this plaintiff, which are particularly described in his said bill, without the authority or consent of this plaintiff, and have trespassed thereon, in each and every such entry, to the damage and vexation of this plaintiff.

And on or about the 30th day of October, A. D. 1868, now last past, the said Allen, Collector, and Ferguson, Assessor, under color and for the execution of the Acts of Congress, set forth in said bill, in their official capacity and, as this plaintiff is informed and believes, also under the direction and in pursuance of the regulations and requirements of said Rollins, Commissioner, &c., did, without the consent of this plaintiff, enter upon the premises aforesaid, and into said Alcohol house, and did inspect and follow out the several pipes and connections there found, and did compel and require the presence of an artizan or mechanic, with suitable tools, and required and caused the said mechanic to dismantle said Alcohol still and disconnect certain of the pipes thereof, and to injure and so derange the same that it, the said still, cannot be used; and did, by said trespasses and unlawful acts, greatly damage the property of this plaintiff.

And this plaintiff further saith, that on or about the first day of November, A. D. 1868, said Ferguson did, as Assessor, as aforesaid, say to the lessee and occupant of the distillery mentioned in said Bill of Complaint, "that the steam pipe," connecting said Alcohol still with the steam boilers of said distillery,—being the pipes appurtenant to the said Alcohol still, and through which the steam is to be supplied to said still, from the steam boilers aforesaid—"must be taken out,"—and did, then and there, to wit: before the filing of complainant's said bill, command said lessee of said distillery to remove and take out said pipes

altogether,—and did say, said pipes would have to be taken out;—all which requirements and commands of the said Ferguson, as Assessor, as aforesaid, this plaintiff is informed and believes, were given and made as above set forth, and have never been revoked. And this plaintiff believes that said Ferguson did command and require the removal of said pipes, as aforesaid, for the purpose of preventing this plaintiff from having any benefit from the said steam pipes, and from obtaining, and having furnished to him, the steam to run his said Alcohol house, according to the terms of his said lease, and to harass and vex the plaintiff and destroy his property, and to carry said statutes into effect, and to execute the Acts of Congress set forth in his said Bill of Complaint.

And this plaintiff is further informed and believes, that, at the time, last aforesaid, said Ferguson, as Assessor, did claim the right to remove said pipes, and compel the same to be done, and did threaten, and still does threaten, to take away and remove said pipes and appurtenances, to the constant annoyance, vexation and distress of this plaintiff, and doth, by his said acts and threats, make the value of this plaintiff's right to steam, by virtue of his said lease, of no account, and doth utterly divest the said covenants, to furnish steam, of all value in market, either for sale or lease.

And plaintiff further says, that but for the threats of said defendants and the said Acts of Congress, said right to steam would be worth a great sum, viz: $1,000 and upwards; and that said pipe is laid in the ground, and, if taken out, could not be replaced, except at great expense, during the winter; and further, that, by means thereof the lodging rooms in said house are heated, and the remo-

val of said pipes would destroy the value of all the heating arrangements, now in daily use in said building.

And this plaintiff further states, that the pipes and connections of the said Alcohol Still, are the true and proper appurtenances of the said Alcohol House, erected and placed in a proper and legal manner for the prosecution of a lawful business, for the following reasons, viz:

That, in the year 1867, the owner of the adjacent distillery, having become convinced (as this deponent is informed and verily believes) that the manufacture of highwines, from grain, could not be made a profitable business, under existing laws; that the high wines were a crude article, and only valuable in market because purchased for the purpose of re-distillation and refinement into alcohol, cologne spirits and other fine spirits of great value, for medicinal, mechanical and other general consumption; and that the manufacture of such pure or refined spirits, by distillation from grain and immediate re-distillation, was profitable if carefully and economically conducted—did conclude to convert the said establishment into a manufactory of such pure and refined spirits, by the addition of such stills, works and machinery, as were necessary thereto. And because the Statutes of the United States did forbid the erection of rectifying and refining works on the same premises with a distillery (by enactments which the plaintiff believes void), the said owner, in conformity therewith, and in compliance with all the requisitions and directions of the revenue department, did erect a building across a street, and two hundred feet distant from said distillery, and did place therein the Alcohol Works in question, and arrange the same at a cost of about Thirty Thousand Dollars; and, because alcohol and pure spirits are very inflammable, and the place, where the same are manufactured, stored or

handled, liable to become filled with explosive vapors and gases, did arrange, so that no fires need be built in or about said Alcohol House, by connecting the same by steam pipes with the steam boilers of said distillery, and taking steam through said pipes to run said Alcohol works, and heat the lodging rooms, for the watchmen and other persons connected therewith, and the office and barreling rooms, and thereby did save very heavy expenses of insurance, amounting, as this plaintiff believes, to more than six per cent on the value of the buildings, works and contents, per annum (viz: more than $1,800); and also did save the expense of an extra boiler, arch and stack, amounting to more than $2,500, and the expense of a large fire, thereunder, and the wages of the firemen. And said owner did also lay water pipes properly connected with pumps, to force the water from springs, and a stream adjacent thereto, into said Alcohol works; and did also lay waste pipes, to carry away all waste fluids,—all which pipes were placed as appurtenant to said Alcohol works, and for the prosecution of the lawful use thereof, in a lawful manner, and for no other purpose.

And this plaintiff further states, that it is necessary to a complete Alcohol Works, to have steam pipes connected with steam boilers, and water pipes connected with a large supply of cold water, and ducts or drains to carry away waste fluids; and that, without steam, the distillation cannot be carried on, and, without water, it would be impossible to condense or obtain alcohol by distillation; and drains and gas pipes are appurtenant, as is well known, to all buildings where waste fluids collect, or gas can be obtained.

And this plaintiff further shows, that there are now connected with said Alcohol Works, no other pipes than

the water and steam pipes aforesaid, laid and connected only as aforesaid, except a gas main, connected with gas works, adjacent to said Alcohol house, and at a distance from said distillery.

And said Works, alcohol manufactory and appurtenances, having been completed about the first day of January, A.D. 1868,—the same including both said Distillery and Alcohol Works, with the steam pipes and water pipes connected with said springs,—were approved by the Revenue Department, of the United States, taxed and licensed, and run for many months prior to July, 1868.

And this plaintiff, not being able to carry on the whole establishment, did lease, as set forth in said bill, the said lands and Alcohol house, with the appurtenances, and steam to be furnished, as in said Bill of Complaint alleged.

And thereafter, the said statute of July 20th, 1868, having been passed, the owner of said property did let the distillery aforesaid, with the cattle barns and appurtenances, reserving and taking a covenant from the lessee thereof, that he would furnish the plaintiff steam from the steam boilers of said distillery in accordance with the terms of his said lease.

And, thereupon, said lessee paid the license tax, and obtained a license for said distillery, and is now running the same.

And this plaintiff further states that he intends, and is about, to give notice of his intention to run said Alcohol Works or rectifying establishment, as required by the statute, set forth in his said bill (except that said notice will state that said rectifying establishment is 200 feet from a licensed distillery), and to tender to the said Allen, collector—he being the collector of the district where said

premises are situated—the license tax upon said rectifying establishment, and thereupon to connect the pipes and portions of said Alcohol Works, where the same were disconnected and dismantled by the authority and direction of said defendants as above set forth,—and put said Works in order and run the same as a rectifying establishment, and use the same for the business of rectifying, which business said plaintiff avers is a lawful business, and will be carried on by said plaintiff, in a legitimate and correct manner, as a means of livelihood and profit, like any other trade, business or vocation in which men engage.

And this plaintiff further states, that he is informed and verily believes, that said Allen, as collector, intends to refuse to accept the said tax, and that the said collector and said Ferguson, assessor, do intend and threaten forthwith to seize said Alcohol house and interfere, by violence and force, with this plaintiff and his employees in said Alcohol house, and to seize the property of this plaintiff and the product of his said rectifying establishment, wherever the same may be, and to harass and destroy this plaintiff.

And this plaintiff states that, in dismantling said still as aforesaid, and in the other interferences, commands, threats and doings to prevent the use of said alcohol still, the said defendants do attack and destroy the property and rights of this plaintiff, acquired under and in pursuance of the statutes of the United States; and, if the acquisition or use of a rectifying establishment within six hundred feet of a licensed distillery, can in any event be a crime, or contrary to law, the statute in this behalf is, as to the Alcohol Works aforesaid, *ex post facto*; and any proceeding against this plaintiff, thereunder, would be, and is, a trespass.

And this plaintiff further states that he is informed and verily believes, that said defendants and each and every one of them, would be deeply insolvent and bankrupt, if called upon to answer for the trespasses they have already committed and the liabilities they have incurred, and that personal judgments against them for his damages, in this behalf, would be of no value; that their trespasses upon said works, and acts of usurped authority over the same, are frequent and harassing, and for the above reasons, as well as for the reasons set forth in the said bill, are working irreparable injury to this plaintiff.

And plaintiff further states, that, from the first day of November, last, to this time, he has been prevented from running said Alcohol works and using the same, by the seizure and dismantling thereof, as above set forth, by said defendants, Allen and Ferguson, as officers as aforesaid; and that, during all said time, all of said defendants exercised authority over the same, under color of said void Acts of Congress, and by virtue of no other warrant or process or authority, whatsoever; and that said defendants still do exercise control and authority over the same, and do prevent, by color of said Acts, and by no other authority, whatever, the use of said works for the purposes of rectifying, as aforesaid, and manufacturing alcohol and pure and refined spirits. And this plaintiff verily believes that, in starting and running said works,—as he is compelled to do,—without the protection of this Court, unless the injunction prayed is granted, he will come into actual collision with said officers or their agents, and will be compelled to protect himself and his property in the prosecution of his lawful business in the manner aforesaid, with force and arms, and at great peril to himself.

And this plaintiff further states that the said Alcohol house is built above the ground, and none of said Works are in any manner concealed; that the building is separated from all other buildings, by roadways, streets and commons or vacant lands of considerable extent; that it has no cellar, and the basement is entirely above ground at one end of the building, and partly above at the other; and that said building and works are accessible from every side.

AMENDMENTS TO PRAYER.

Therefore this plaintiff prays that he may be permitted to pay said license tax into Court, and that, during the pendency of this suit, the said defendants may be restrained by Injunction, according to the prayer of said bill; and that such other or further orders may be made as in the premises shall be just; and that a Mandamus may issue, commanding said Assessor to assess and said Collector to collect and receive the said special or license tax upon said rectifying establishment, and to license the same.

CONFEDERATING PART OF BILL.

But now, so it is, may it please your Honors, that the said defendants, combining and confederating together, and with divers persons in great numbers, whose names are unknown to your Orator, but who are, as aforesaid, described as supervisors, gaugers, detectives, store-keepers, revenue officers and informers, and who are, for the most part, under the direction and control of said Rollins, and confederating, also, and combining with divers other persons, whose names are at present unknown to your Orator, —all whose names, when discovered, your Orator prays he may be at liberty to insert herein, with apt words to charge them as parties defendants hereto,—and, contriving

how to wrong and injure your Orator, do pretend that said Acts of Congress, and the rules, regulations and decisions aforesaid, are good and valid laws, and threaten and go about to carry the same into effect, and grievously to oppress and destroy your Orator and divest him of his property, his liberty and his just rights.

INTERROGATING PART.

To the end, therefore, that the said defendants may, if they can, show why your Orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories, hereinafter numbered and set forth, as, by the note hereunder written, they are respectively required to answer, that is to say:

1st. Whether, or no, he believes himself bound, by his oath and duties of office, to carry said Acts of Congress into full effect? and—if yea—whether, or no, he intends so to carry said Acts of Congress into effect?

And—if yea—what means he is employing and intends to employ, and by what proceedings to proceed to that end?

2d. Whether, or no, rules and regulations and decisions, of which printed copies are annexed to this bill, were issued by the defendant, E. A. Rollins, "Com-"missioner?"

If, yea—in what form were they issued? If only a portion thereof were so issued,—designate the same, and state and set forth, by whom and under what authority the remaining portions were issued.

3d. Whether, or no, any other rules, regulations, decisions or orders, for the purpose of carrying said Acts of Congress into effect, have been issued? and, if yea—state by whom, under what authority, to whom; and, if printed copies thereof are within your control, attach the same to your answer; if not within your control, so state.

4th. Whether you believe said rules, regulations, decisions and orders, or any of them, have any binding force upon you? If, yea—state or designate which you believe yourself bound to obey.

5th. Whether you believe the same to require obedience or acquiescence from rectifiers, distillers, tobacco manufacturers, compounders of liquors, makers of stills, or any and which of them.

6th. If to the 5th interrogatory you shall answer, yea,—state, whether you intend or have intended, to require such obedience or acquiescence,—in what manner and by what means.

7th. State and set forth fully, what requirements are made by you, touching meters; and state, especially, whether, or no, you do require distillers to purchase meters before permitting them to start their distilleries. If any are permitted to start before receiving such meters, state on what conditions they are permitted to start. State also, particularly, whether or no, any sum, of money, or other representative thereof, is required from distillers to pay for Tice's meter, or any other meter, and, if so, what meter;—whether such meter is furnished to the distiller depositing, and by whom; and from whom said meters are purchased.

State also, whether, or no, there is any contract or agreement, or understanding between the makers, venders or owners of said meters and said Rollins, or any other revenue

officer, touching the furnishing of the same, to distillers or manufacture or sale of the same, and the whole of such contract, agreement or understanding. State also, to the extent of your knowledge, information and belief, whether said Rollins or any other revenue officer is, in any manner, interested in the ownership, manufacture or sale of such meters, and whether or no, he, or any other revenue officer will or has, in any manner, got any gain from the furnishing or sale of such meters to distillers, as aforesaid. If: yea,—what gain?

8th. Whether there are any officers of the revenue or any other persons who are in any manner authorized to carry said Acts of Congress, or said rules, regulations, prescriptions or opinions, or any or either of them into effect, or to enforce the same, who are not under the supervision, direction or control of said Rollins, "Commissioner," &c.—If yea,—state and set forth, who such persons are, and the nature and extent of their authority.

9th. Have you stated fully, fairly and honestly your entire knowledge of the subject matter of the foregoing interrogatories?

Lastly: If any matters have been known to you, other than those set forth in your answers to the foregoing interrogatories, which may tend to the advantage of either party to this suit, or will promote a just and equitable decision thereof, state them fully.

(Note.—The defendant E. A. Rollins, is required to answer all the above interrogatories, and the defendants Allen and Ferguson are required to answer all said interrogatories except the 8th.)

RELIEF PRAYED.

To the end, therefore, that the plaintiff may have

that relief which he only can obtain in a court of equity, and that his said lands and estates may be relieved from the incumbrance and cloud of the said Acts of Congress, and that his person and liberty and property may be released from the duress and destruction of the said Acts of Congress, and the rules, regulations, prescriptions and opinions of the said Commissioner, and that the said defendants may answer in the premises, and that the said defendants, and each and every one of them, viz: Edward A. Rollins, Commissioner, William B. Allen, Collector, and Duncan Ferguson, Assessor, their counselors, attorneys, solicitors, officers, agents, successors in office, and all persons under the supervision, direction or control of them or either of them, may be restrained, by Injunction, issuing out of this Court, from proceeding further against your orator, or in any manner attempting to carry said Acts of Congress, or said rules, regulations, instructions, prescriptions or opinions into effect, or to execute the same in any manner against your orator or his property (except to collect and receive from him the taxes and excises therein justly laid), or in any manner entering upon or intermeddling with any of your orator's property, his person, his servants, agents, or business connections.

And that the said Acts of Congress may be declared null and void and of no effect (except the portions which lay taxes and excises according to law, and those portions which repeal former statutes).

And that all the said rules and regulations, opinions, prescriptions and instructions of the said Commissioner be declared null, and of no force or effect, whatever.

And that your orator may have such further, other or different relief in the premises as may be just and agreeable to equity.

Then follows prayer for Subpœna, Injunction and relief; and verification.

SUPPLEMENTAL BILL.

To The Honorable Judges of said Court:

Humbly complaining, showeth unto your Honors, your Orator, Lemuel W. Mason, that, on the day of November, A. D. 1868, your Orator exhibited his Original bill of complaint against the said defendants, and which said bill has been amended by order of this honorable Court, thereby praying, among other things, that a Mandamus may issue, commanding said Assessor to assess, and said Collector to collect and receive the special or license tax upon the rectifying establishment mentioned in said bill, and to license the same.

And your orator further showeth, by way of Supplement, that, since the filing of his said original bill, your Orator gave said assessor notice of his intention to run said rectifying establishment or Alcohol works, and in said notice did comply with all the requirements of the statute, except that said notice stated that said rectifying establishment was 200 feet from a licensed distillery; and your Orator requested said Assessor to assess the special tax upon said rectifying establishment. And said assessor admitted and acknowledged that your Orator's notice was in all respects sufficient, save only that it stated said rectifying establishment to stand 200 feet from a licensed distillery; and for that reason, and that only, said assessor refused to assess said special tax thereon.

And thereupon your Orator applied to said Collector, he being the collector of the district wherein said Alcohol house or rectifying establishment is situated, and tendered to said collector the sum of $200, being the amount of the special tax upon said rectifying establishment, and de-

manded of said collector a license for the same. And your Orator has ever since been, and now is, ready to pay said special tax, and hath often requested said assessor to assess, and said collector to receive the same, and to license said rectifying establishment; and was in hopes that said assessor and collector would have complied with his fair and reasonable requests, as in justice and equity they ought to have done.

But now, so it is, may it please your Honors, that the said assessor refuses to assess said tax, and said collector refuses to collect the same, and to license said rectifying establishment, and do maintain and continue their authority over and supervision of said premises and rectifying establishment, and do forbid and prevent your Orator from using the same, to the manifest wrong and injury of your Orator in the premises.

And your Orator further states, upon his information and belief, that Columbus Delano hath been appointed Commissioner of the Internal Revenue, as successor to said Rollins, and doth continue and enforce all the rules and regulations of said Commissioner Rollins, and gives out that he will execute the said Acts of Congress, mentioned in the said bill of complaint herein, and will prevent your Orator from using said Alcohol house as a rectifying establishment :—

To the end, therefore, that the said defendants may, if they can, answer in the premises, and show cause, if any there be, why a mandamus should not issue, commanding said assessor to assess, and said collector to collect, said special tax, and license your Orator's said rectifying establishment, and that said defendants may be restrained by injunction, and that your Orator may have full and perfect relief according to the prayer of his said bill:

May it please your Honors to grant unto your Orator, not only a writ of Mandamus, commanding said assessor to assess, and said collector to collect, the special tax upon your Orator's said rectifying establishment, and to license the same, but also an Injunction, commanding said defendants to desist and refrain from interfering with your Orator and his said property, according to the prayer of his said bill:

And also a writ of subpœna to be directed to the said William B. Allen, Collector, and said Duncan Ferguson, Assessor, thereby commanding them, and each of them, at a certain time and under a certain penalty, therein to be limited, personally to appear before this Honorable Court, and, then and there, full, true, direct and perfect answer make to all and singular the premises, and, further, to stand, to abide and perform such further orders, direction and decree, as to your Honors shall seem meet.

LEMUEL W. MASON.

BY E. ROBY, *his Solicitor.*

EDWARD ROBY, *Plaintiff's Solicitor.*

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Lemuel W. Mason, the above named plaintiff, being first duly sworn, saith, that he has heard read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief; and as to those matters he believes it to be true.

LEMUEL W. MASON.

Sworn to before me this 20th day of April, A. D. 1869.
JOHN MAGOUN, *Notary Public.*

Edward Roby

Counsel.

UNITED STATES OF AMERICA:

SUPREME COURT.

274 Mason v Mann et al

275 Mason v Hart et al.

ARGUMENT OF EDWARD ROBY,

FOR THE

JURISDICTION OF THE CIRCUIT COURTS IN THE CASES AT BAR.

A motion by the Defendants in the Bills to dismiss the suits for want of jurisdiction, raises a question *in limine* which must be decided before the case can be examined upon its merits.

CHICAGO:
BEACH & BARNARD'S PRINT, 126 S. CLARK STREET.
1870.

INTRODUCTION.

As the motion of the defendants, is to dismiss the bills *for want of jurisdiction*, it admits, as far as the motion is concerned, the matters alleged, and also that they are sufficient to establish a right, and only denies the power of the court over either (1) the parties, or (2) the subject matter. It is not needful to go into the details of statement. If the court has jurisdiction, the details can be amended if defective;—if it has not jurisdiction, the motion to dismiss must be sustained.

The parties to the suit are a distiller as plaintiff, a Deputy Collector, Collector, Assessor, and Commissioner of Internal Revenue, as defendants. All of the defendants but one, are citizens of the same State with the plaintiff.

The subject matter arises thus:

The plaintiff during certain months produced, was assessed for and paid the taxes on certain highwines, and is not liable to the government for any tax whatever on the spirits produced by him, because he has paid the same in full.

The Assessor, acting under the statute, and a regulation of the Commissioner, (as a ministerial officer and not otherwise,) had, before this time, estimated the "producing capacity" of the distilleries by a rule fixed by the Commissioner; and after the return and payment, proceeding

likewise as a ministerial officer under such regulations, estimated the difference between the amount actually produced, and eighty per cent. of the "producing capacity," and called the same "deficiency;" and (knowing that this amount had not been produced but proceeding ministerially only, under the directions of the Commissioner,) computed the sum which would have been chargeable upon this amount if it had been produced. He also calculated the difference between the amounts actually produced and the productive power of a bushel of grain as estimated by the (dry measure of mathematical) regulation in the Commissioner's office, and computed the sum that would have been chargeable if the amount had been produced.

In all this, the only judicial office or exertion of discretion on the part of the assessor, was the decision made by him as assessor, *that plaintiff had paid the full tax on all that he actually produced.*

The collector, under the regulations of the department and control of the Commissioner, is proceeding, through his deputy, to seize from the plaintiff the sums so computed, into the possession of the United States.

The plaintiff having lost severely by the misfortunes which caused the deficit, is unable to pay; and this amount, $8,000 or $9,000, will be raised by forced sale of property, causing great consequential damage; in sacrifice at the sale; in cramping and breaking up his business, by taking away his capital, stock in trade or machinery; in destroying his credit; in compelling an entire change, and reduction in his plans and mode of life; in scattering and destroying the business which he has now organized; and in many other ways. (As property rarely brings half its value at forced sale, the first item of consequential damage

is equal to the amount collected; and it appears that the government will thus take from him about $16,000 at the outset.)

It is also true that where a merchant or manufacturer, in an uninsurable trade, owing the usual credits, has his stock and establishment so damaged by fire as to greatly cripple his capital and inconvenience his business, the actual loss is often more than double the amount of direct injury.

(Estimated upon this rule, the consequential would be thrice the direct damage from the contemplated seizure.)

The bills allege and specify the irreparable injury, and state that there is no remedy at law for any portion either of the direct or consequential injury.

Enough has been said to show that this is a case arising under the laws of the United States,—

That it is based solely on the Constitution;

That the amount computed and to be seized by the government through these officers, is not a direct tax, because:

(1.) It is not and does not purport to be laid directly on the plaintiff.

(2.) There is no Statute of the United States laying or purporting to lay direct taxes on any persons in Illinois.

(3.) It is not, and does not purport to be laid by apportionment, according to the census.

It is not an indirect tax, duty, impost or excise; for all these require to be laid on some existing thing. (*For balance of this division, see Sec.* 71, *post.*)

Therefore it is not a tax;—and the collector of taxes,—by his official powers,—and under the direction of the

Internal Revenue Department, is attempting to obtain, and deliver to the United States, this sum, which is not a tax, was never laid upon the plaintiff or his property, and which he does not owe to the government. It thus appears that the plaintiff has a clear and undeniable right to the possession of his money and property.

As the case of *Philadelphia* v. *The Collector*, 5 Wallace, 720, has been thought to have some bearing on the questions at bar, I will examine its bearing here.

(1.) The first portion of the decision noted in our examination with this view, is found at page 730: "The "jurisdiction of the Circuit Court over such controversies, "when all the prescribed conditions for the removal con- "cur in the case, is clear beyond doubt, irrespective of the "citizenship of the parties."

The conclusion inevitably following this language, is that if jurisdiction of the subject matter of a case is in the court, *the parties* though citizens of the same State, *are entitled to its exercise.*

(2.) Following this decision is the following rather remarkable, *obiter* language:

"Although the point was not made in this case, it seems "proper to remark, that the jurisdiction of the Circuit "Courts has often been denied in this class of cases, be- "cause the party agrieved may appeal to the Commis- "sioner for redress, and because he may also pursue his "remedy by petition to Congress, or present it in the Court "of Claims. Suffice it to say, without entering much into "the argument, that such a theory finds no substantial sup- "port in any Act of Congress upon the subject, or in any "decided case."

It is remarkable in this, (1.) Though the point had not been mentioned, and was not at all necessary to the decision of the case, the court deemed it of such importance as to call for special comment.

(2.) The reason why this special comment was required is remarkable,—the jurisdiction of the Circuit Courts had often, not in a few distant cases merely, but *often* been denied for the reasons specified.

The cases had arisen, the jurisdiction had been sought; but it had been denied,—*often*,—and evidently not by the Supreme Court, for then there would be no propriety in introducing the matter into this case; and quite as evidently the denial had been by the Circuit Courts, for while Circuit Court decisions are preserved in public prints and circulated, so as to come to the knowledge of distant judges, the arguments are never so preserved,—and if the decisions had been as often against them as they were offered, there would have been no denial, but merely argument.

Our own experience justifies this conclusion, for we have seen in newspapers and heard from rumor that Circuit Courts have, all over the country, refused to exercise jurisdiction on just these grounds,—and I do not think one of us has ever heard an argument against the jurisdiction. The reports run thus, "the District Attorney raised "the point, and the court announced its familiarity with "the question, and refused to hear argument."

(3.) The third remarkable feature in this dictum is, that in this view it ranks among the most severe and widespread rebukes ever administered to courts of original jurisdiction by a superior, having supervisory powers.

Because these courts had *often* denied justice upon in-

sufficient reasons, the Supreme Court felt constrained to travel out of the record, to admonish them, that their action had no substantial support.

The case itself decides (p. 731) that, inasmuch as the Commissioner is authorized "to repay the collectors, &c., "the full amount of such sums of money as shall or may "be recovered against them in any court, for internal "duties or licenses, collected by them, with costs and ex- "penses of suit," suit may be maintained against such collectors for such illegal or erroneous assessments as the party pays under protest, or with notice that he intends to commence suit. That for such moneys, so paid, an action of assumpsit will lie, and that it is believed to be as appropriate and effectual a remedy as is known to the common law. (P. 733.)

In an action of assumpsit nothing but the amount received could be collected. Interest is not an incident to the promise to pay money, and unless there is some statute or usage controlling the case, no implied promise to pay interest can arise.

Would the remedy be more effectual if in trespass or trover?

Teal v. *Felton*, 12 How., 284, and *Tracy* v. *Swartwout*, 10 Peters, 80, decide that the law, (and not the instructions of a department), furnishes the justification of an officer.

In *Tracy* v. *Swartwout*, the collector attempted to justify his act by the regulations and forms of the Treasury Department, which in good faith he had obeyed, but the court holds (p. 95), "Where a ministerial officer acts in good faith, for an injury done, he is not liable to exemp-

" lary damages; but he can claim no further exemption " when his acts are clearly against law ;"—at page 98 it appears that in such cases the government was bound to indemnify the officer.

The cases are parallel in all points, and the conclusion is, that in whatever manner a remedy at common law is sought, the measure of damages is the same, and that the action in assumpsit is as effectual as any other.

From this it appears that the common law furnishes no complete remedy, adequate to place the party in the same position as if no injury had been committed. And upon the basis of our calculation it would appear that but one-fourth of the actual damage would be refunded, and that without interest.

The remedy at law must be as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity, or it will be decided that there is in fact no remedy at law. (For authorities see *Payne* v. *Hook*, cited section 2 post.)

Hence, though we have the most effectual remedy the common law can give, it is no remedy for this wrong.

It is no remedy on another ground.

The United States is taking the money or property and converting it into its treasury through a ministerial officer who is a mere channel for its conveyance; and a right to sue this ministerial officer after he has parted with the money so that it, as a fund to draw upon, is forever lost to the owner, is no remedy against the principal who has done the injury and received the fund.

(1.) The officer's claim against the government does

not arise till he has paid the judgment, and then, and not till then, the Commissioner may repay him.

(2.) As an execution is necessary to judgment,
Wayman v. *Southard*, 10 Wheaton, 23,
and no execution can issue against the United States, there can be no remedy at law, by the officer or the citizen to enforce re-payment by the government.

(3.) The remarkable dictum of one case which we have considered (p. 730) that neither the right of appeal to the Commissioner for redress, nor of petition to Congress, nor of prosecution in the Court of Claims, affords a remedy sufficient to authorize the courts to refuse cognizance and deny jurisdiction.

And we conclude that if—because these afford no sufficient and complete redress to oust the common law of the right to declare and concoct an implied or fictitious promise, that equity may be done—it is determined that the Circuit Courts have *often* erred in denying jurisdiction,—the same inadequacy in the common law remedy which forces the decision that there is no real remedy at common law, must require chancery to afford its remedy; and if the Circuit Courts have often refused to take cognizance of such cases, and afford a remedy, they have as often erred.

This case, of *Philadelphia* v. *The Collector*, it is plain, does not decide nor purport to decide that there is an adequate remedy at law.

I will now proceed to the argument, first determining by authority what is the appropriate and complete remedy for the violation of this clear and undeniable right.

I will cite the authorities *which have decided* that this

Court has inherent in it, jurisdiction and power to grant this remedy which nothing but the power that made and can alter the Constitution, can take away, *some of them clear and to the point—direct decisions*—and others in which the doctrine may be called *obiter dictum*. If it is so denominated even in a portion of the cases cited in support of the authority, then I will lay the line to every case opposed, and by their own language show that they were either mere defaults, or inadvertant expressions or *dicta*, and that in denying jurisdiction in such cases the Circuit Courts have done contrary *to the settled law*. And will show that the plaintiff's right to this remedy is as clear and as complete in him as your Honors rights to hold your offices during good behavior, or receive an undiminished compensation.

Among the cases examined will be that upon which the United States attorney most relies. To understand it, it is necessary to understand the principles of law, which were not raised, considered, decided, or even questioned in that case. I have, therefore, deferred its consideration to section 64 post, to which I beg leave to refer.

SECTION I.

Neither the officer nor the Government has any right to the money sought to be collected by the distress.

(This will more fully appear in the progress of the argument.)

SECTION II.

The only remedy is an Injunction from the Federal Courts.

When, as in this case, the seizure of property, wrongfully, will entail consequential damages, for which the law gives no complete remedy, equity will afford a full and prompt remedy by injunction.

Watson v. *Sutherland*, 5 Wallace, 78.
This is a parallel case.

Where, *as in this case*, money, seized for taxes wrongfully, will be paid over to the State which cannot be sued, equity will prevent the seizure, on the principle that equity will always prevent the transfer of a specific article which, if transferred, will be lost to the owner.

Osborn v. *U. S. Bank*, 9 Wheat., 845.

"It is not enough that there is a remedy at law. It "must be plain and adequate, or, in other words, *as prac-* "*tical and efficient to the ends of justice and its prompt ad-* "*ministration, as the remedy in equity.*"

Boyce's Ex'rs v. *Grundy*, 3 Peters, 210, p. 215.
Payne v. *Hook*, 7 Wallace, 430.
Osborn v. *U. S. Bank*, 9 Wheat., 841, 842, and 845.
Barber v. *Barber*, 21 How., p. 591.
U. S. v. *Howland*, 4 Wheat., 108.

The right in this case is stated in the Constitution: "No man shall be deprived of his" * * * "property "but by the judgment of his peers or the law of the land." For this we seek a remedy; and there is but one complete

remedy, viz: that which prevents any deprivation. The right to sue for and recover the money from the officers after years of expensive litigation and of exposure to the risk of their insolvency, cannot be as practical and efficient as the remedy in equity, and can never be complete; for, as we have seen, *prevention* is the only remedy co-extensive with the right.

" *The absence of a complete and adequate remedy at law* " *is the only test of equity jurisdiction*, and the application " of this principle to a particular case, must depend on the " character of the case, as disclosed by the pleadings."

Payne v. *Hook*, 7 Wallace, 430.
Watson v. *Sutherland*, 5 Wallace, 78.

The equity jurisdiction of the courts of the United States is not limited or restrained by the local remedies in the different States; it is the same in all the States, and is the same which is exercised in the land of our ancestors from whose jurisprudence our own is derived.,

Rhode Island—*Pratt* v. *Northam*, 5 Mason, p. 105.
Mass.—*U.S.* v. *Howland*, 4 Wheat., p. 115
Tenn.—*Robinson* v. *Campbell*, 3 Wheat. p. 221-2, (leading case.)
Miss.—*Green's Adm'r.* v. *Creighton*, 23 How., 90, and authorities cited, 95.
Mo.—*Payne* v. *Hook*, 7 Wallace, p. 430 (opinion by Davis, J.)
Irvine v. *Marshall*, 20 How., 558.

Therefore, on principle, the fact that the citizen might have a remedy in a State court, cannot affect the remedy in the United States court, and it is so decided.

Barber v. *Barber*, 21 How., 592.

But, he cannot have a remedy in a State court; for judicial control over officers of the United States, as such officers, must of necessity belong to the judicial power of the United States, and not to the judicial power of the several States; and this is vested in the courts of the United States, and not reserved to the States respectively. The State courts have jurisdiction of the persons of their citizens, as such; but as officers of the United States they are under the control of its government *only*.

McClung v. *Silliman*, 6 Wheat., 598.

For other authorities see post, sec. 50, *et seq.*

The Judicial department is as much a part of the government of a State as the Executive, and can no more control the officers of the United States than the State Executive.

Upon this point our course begins to digress from what may be the commonly received opinion at this bar, and is certainly the opinion of a number of very learned counsel who have brought similar suits in State courts, and of the District Attorney, who has not demurred to their jurisdiction. Their action has caused me to review my own with great care; and while, in view of the principles and precedents which I believe govern the question, I cannot think that they have given the subject a close examination, still their opinions make it my duty to present, for the assistance of the court, a complete resume of those matters, which still compel me to retain my opinion.

The Government of the United States is one of *enumerated powers.*

Gibbons v. *Ogden*, 9 Wheat., 187.

Weister v. *Hade*, 52 Penn. State Reports, 477.

"It can claim no powers which are not granted to it by

" the Constitution; and the powers actually granted, must " be such as are expressly given, or are given by *neces-* " *sary* implication."

Martin v. *Hunter's Lessees*, 1 Wheat, 326.

But where powers are conferred upon the General Government, the exercise of the same powers by the States is impliedly prohibited wherever the intent of the grant to the National Government might be defeated by such exercise. *Its own operations are exempted from State influence.*

McCulloch v. *Maryland*, 4 Wheat., 316, 427.

Had the Constitution contained but this clause: " The " judicial power of the United States shall be vested in the " courts," it would have been clear that a power was enumerated by the people and delegated to the United States or to some department of the Government thereof, and that that power was not reserved to the States, respectively, or to the people.

The judicial power of the United States must extend to the utmost limits of its government, (*post, sec.* 50 *et. seq*;) for, wherever laws are to be obeyed, there they must be construed and enforced, and the power to construe and enforce by punishing disobedience, is judicial. What subjects its name includes, can only be decided by construction. For it is evident that, inasmuch as the Constitution delegates no power to add anything to the powers therein contained, but expressly reserves all powers, not granted, nothing can be added to the fundamental law.

Legislation makes new laws, or repeals or alters old ones, while judicial power decides what the law is and construes, explains and applies it to the circumstances of each particular case. Therefore it is apparent that the first power necessarily included in the words Judicial Power of

the United States, is the power to decide *to what that power extends.*

As with the matter of acquiring jurisdiction, it cannot be determined, till the conservator of this power has passed upon the question, whether the particular matter or party is within the power.

Ex parte Cabrera, 1 Washington, C. C. Rep., 232.
Ex parte Ferguson, 9 Johnson, 239.
Slocum v. *Mayberry*, 2 Wheat., 1.
Same case, 2 Cranch, 1, p. 9 and 10.
Gelston v. *Hoyt*, 3 Wheat., 246, p. 312.
U. S. v. *Judge Peters*, 5 Cranch, 115.
Freeman v. *Howe*, 24 How., p. 457 et. seq.

It is also evident that the power to construe and enforce all laws of the United States, *and especially the power to construe and administer justice distributive under the fundamental law, is essentially and necessarily included in the judicial power of the United States..*

In these matters no interruption could be tolerated and no deference paid to any tribunal which was not invested with equal authority over the subject. We need not discuss the propriety or policy of State courts having the power to interfere with the administration of Federal officers or laws for or against them; that was settled by the framers of the Constitution. We have nothing to do with policy, and can only inquire, *What is the law?*

Were the State courts invested with equal authority, over these subjects, necessarily included in the term judicial power of the United States? The answer is clearly negative.

Though the Constitution and laws of the United States, made in pursuance thereof, are the supreme law of the land, and the judges of the several States are bound thereby, yet the judicial departments of the several States are only departments of the governments of those States, and the judicial power of the United States was not reserved to the States. The Constitution and laws are the supreme law, and the judges of the several States are bound thereby—not to administer the judicial power of the United States;—but, as exercising the judicial power of the several States, they must declare the State constitutions and State laws void, whenever they are contrary to this supreme law, and decline to execute them. It would be as proper for any other department of a State government to administer any other of the powers expressly granted to the United States, as for the State courts to exercise those powers necessarily included in the judicial power of the United States and granted to the Government of the United States.

In the cases at bar, the United States is acting through its officers; they are its agents and under its control. If the money is taken, it will be paid over to it.

Cary v. *Curtis*, 3 How. 247, 249.

In this suit, if it could be sued, it would be a proper defendant.

The Bills of Rights contained in State Constitutions, evidently have no authority over it; nor can State statutes or laws control it. To the fundamental law of the United States and to United States statutes, based thereon and authorized thereby, it and its agents are amenable, and to them alone.

We charge them with violation of that fundamental law, and pray that this clause: "no man shall be deprived of

his property" by the Government of the United States, "but by the judgment of his peers or the law of the land," may be enforced against that government and its officers.

(1.) It is clear that no single State has a government competent or commissioned to construe the fundamental laws of the United States and administer justice based solely thereon;

(2.) And further, that, as the equity jurisdiction of the United States' judicial power is not limited or restrained by the local remedies in the different States, it makes no difference what collateral remedies may be had in State courts, nor how partial or how complete they may be.

(*Authorities cited, ante.*)

Article 3, Section 1, as we have seen, enumerated and granted certain powers to the Government of the United States,—and certain powers passed by the grant, however strict or narrow a construction might have been given to the words.

Section 2 grants nothing. It is, in its first division, constructive only, and names many cases and parties which could not have been included in the grant as strictly construed, but which, by a most liberal construction, would still have been held to be within it. And this view is confirmed by the 11th Amendment, which does not purport to withdraw a particle of judicial power, but only affords a rule of construction of the original grant, viz.: that it shall not be construed to extend to the power to coerce a sovereign State at the suit of any private citizen or an alien.

Upon the ground, which would have been debatable had there been no clauses to construe the grant, is the field of concurrent jurisdiction. Here parties and subject matter may, under some circumstances, be within the judicial power of a particular State, and the State government may

then be competent to administer justice; but, even here, both, parties and subject matter, *must* be within the judicial power of the United States; and the United States' Government must always be competent to administer a remedy. Where the particular dividing line may be, does not concern this argument. It arises only where the suit is brought in the State courts; though it is quite clear that the parties to this suit, viz.: the officers of the United States Government, acting as such, are not under the control of the government of this State, nor is the subject matter within the jurisdiction of the judicial power of this State; but the plaintiff as a citizen, and the defendants, as officers, as parties, and the enforcement of the fundamental law of the United States as subject matter, are within the judicial power of the United States.

I do not wish here to anticipate the argument, but only refer to abstract judicial power—that power which is, or could be vested in the courts without any further constitutional enactment.

(3.) This is then a case of a clear and undeniable right.

It is also a case where the only remedy is by injunction from this court.

It is a case "in equity," arising under the laws of the United States.

It is a case where the Constitution is about to be violated, and the only remedy possible for this wrong, is prayed.

(4.) This is a motion to dismiss a bill, which discloses the above facts, on the ground, (1), that they do not constitute a case of which this court can take cognizance, (provided any defendant is a citizen of the same State with the plaintiff,) and (2), because the statute forbids suits to restrain the collection of a tax.

(5.) The first ground is urged upon these premises:

First. Congress created the courts and delegated to the courts, inferior to the Supreme Court, power over all cases at law and in equity, arising between the citizens of different States.

Second. In 1833, Congress delegated to these courts power over all cases arising under the revenue laws of the United States.

Third. In 1866, Congress repealed the Act of 1833 and withdrew the power.

(6.) It is conceded by the United States' Attorney, and is stated in the case on which he relies as authority, (*Insurance Co.* v. *Ritchie*, 5 Wallace, 541,) that this is a case in equity arising under the revenue laws of the United States; and that but for this resumption, in 1866, of the delegated power, by Congress, the court would have had jurisdiction.

(7.) To the argument we reply that the adjudged precedents, as well as sound construction, forbid all three of the premises presented; and all conclusions, based on them, must fall.

The power of the courts was derived from the People, not from Congress,—they delegated, and can alone divest it.

The judicial power of the United States is vested in the one supreme court and the courts inferior thereto, for, so the letter of the Constitution is. Not such judicial powers as Congress may delegate, but—the judicial power of the United States, is vested.

The courts are Common Law Courts of Justice.

The law of the land is the Common Law.

For every right there is a remedy, and for every injury its proper redress by suit or action.

And this is guaranteed to every citizen by the Constitution.

The cob-webs of half argued and ill-considered cases hang before these principles. For some years past, circuit courts have shrunk from meeting the responsibility of this question, and have smothered it. But, as I believe that upon its decision depends the integrity of our Constitution, and the very essence of civil liberty under this government, (see *Marbury* v. *Madison*,) as I believe it is the most important single question ever presented to this court, and as we are now face to face with it,—I feel that its record must be written, and to that end, ask a patient and careful consideration of the principles thought to govern, and the cases thought to have decided them.

The questions are:

1*st*. *Whether, without reference to the Congressinal grant, the courts have power to remedy every wrong, and*

2*d*. *Whether Congress can take away all remedy at law from the citizen?*

SECTION III.

The right is absolute, and the power of the Courts to afford the remedy, is also vested in them absolutely.

If citizens of the United States, as such, have an absolute right to acquire, possess and enjoy property, under the Constitution, it is because this right is inherent, absolute, inalienable.

Grotius, Lib. 1, C. 1, S. 4 et seq.
Rutherforth's Inst. 14, et seq.
1 Bl. Com. 122 to 145.
Declaration of Independence.

Because it is the duty of governments to protect the citizen, and especially because this government was established to secure liberty and justice to the citizen.

Const. Preamble, and Amendments, Art. IX.

At page 138, BLACKSTONE writes:

"The third *absolute* right *inherent* in every Englishman "is that of property, which consists in the *free use, enjoy-* "*ment and disposal* of all his acquisitions *without any con-* "*trol* or diminution, save only the law of the land.

"The original of private property is probably found in "Nature, * * * but, certainly, the modifications un- "der which we at present find it, *the method of conserving* "*it in the present owner* and of translating it from man "to man, are entirely derived from society, *and are some* "*of those civil advantages, in exchange for which, every* "*individual has surrendered a part of his natural liberty.*

" The laws of England are, therefore, in point of honor " and justice, extremely watchful in protecting this right.

" Upon this principle the great Charter has declared " that no free man shall be disseized or divested of his free- " hold, (that is lands or livelihood, 2 Co. Inst. 46,) or of " his liberties, or free customs, but by the judgment of his " peers or by the law of the land. And by a variety of " ancient statutes it is enacted *that no man's lands or goods* " *shall be seized into the King's hands against the Great* " *Charter and the laws of the land*, and that no man shall be " disinherited, or put out of his franchises or freehold *un-* " *less he be duly brought to answer and be forejudged by* " *course of law ;* and if anything be done to the contrary, " *it shall be redressed and holden for none.*" (Lord COKE translates this word, " undone," instead of redressed, 2 Co. Inst. Proele.)

" So great, moreover, is the regard of the law for private " property, that it will not authorize the *least violation of it*, " no, not even for the general good of the whole commu- " nity."

The manner, in which liberty and justice are to be preserved, appears :

1st. " All legislative powers *herein granted*, shall be vested in Congress." (Const. Art. 1, S. 1.)

2d. " The Executive power shall be vested in a President." (Art. 2, S. 1.)

3d. " The Judicial power of the United States shall be vested in one supreme court, and such inferior ocurts as the Congress may, from time to time, ordain and establish." (Art. 3, S. 1.)

" The judicial power shall extend to all cases in law and " equity, arising under this Constitution, the laws of the " United States, ' &c. (Art. 3, S. 2.)

The grant of legislative power is limited.

Hayburn's Case, post.
Const. Art. 1, S. 1. Amendment X.

The grant of judicial power is absolute (Art. 3, S. 1 and 3), and extends to *all* cases in equity as well as at law.

The province of equity is well established, viz.: to remedy those things wherein the law, by reason of its universality, is deficient.

Grotius, De Equitate, S. 3.
Plowden, 375.
1 Blk. Com. 62.

To assure a remedy wherever there is a right.

It grew out of Magna Charta (" We will not to any man deny nor put off, either justice or right ") and the constitution of Chancery, wherein the Chancellor was directed to find a remedy for every violation of Magna Charta. (Co. Inst.)

How Injunctions grew into use, we do not know; but that they were granted as an exercise of judicial power by all courts of equity, at the date of the Constitution, and that all men, liable to suffer irreparable injury for which they had no remedy at law, had the right to the protection of this power, no one will deny.

This power was a "judicial power in equity," or it was not: if it was not,—nearly all our courts of equity, to day, issue such mandates unwarranted and powerless;—if it was,—it was vested in the courts of the United States, by the Constitution.

As no power is granted to the legislature to divest the judicial department of the judicial power, or any part thereof, that power must remain complete and intact until the People act upon it.

Amendment X.

If Congress can "divest the courts" of the least particle of judicial power, it can divest them of the most essential portions, or destroy it altogether.

As there can be no limit to such legislation, if allowed, at all, it must be stopped at the threshold.

And the courts must jealously and firmly resist any encroachment whatever.

Hayburn's Case, 2 Dallas, 409, and note.
(See especially the preamble to N. Y. Resolutions.)
Du Chastillux v. *Fairchild*, 15 Pa. 18.
State v. *Fleming*, 7 Hump. (Tenn.) 152.
Ervine's Appeal, 16 Penn. 256.
Young v. *The State Bank*, 4 Ind. 301.

SECTION IV.

The Government of the United States is divided into three distinct and independent branches or departments. Only certain enumerated legislative powers are vested in the Congress, but the whole judicial power of the United States has been placed in the Courts.

Hayburn's Case, 2 Dallas, 409, A. D. 1792.

This case arose on a motion for a mandamus, commanding the Circuit Court for the District of Pennsylvania to proceed with the petition of Wm. Hayburn, who had applied to be put on the pension list of the United States as an invalid pensioner. The case, being very important, was held under advisement until the next term. In the meantime Congress repealed the obnoxious law, and no decision was ever given by the whole court.

The Supreme Court was organized and held its first term, February 1790.

JOHN JAY, *Chief Justice.*
WM. CUSHING, JAMES WILSON, JOHN BLAIR, } *Justices.*

At August Term, 1790, James Iredell qualified as justice. No other justices were added until after the decisions mentioned below.

The business of the court was light, occupying but nine pages of the report, and being five cases, in which States were parties as plaintiff or defendant.

April 5th, 1792, the Circuit Court for the District of New York, consisting of John Jay, Chief Justice, Cushing, Justice, and Duane, District Judge, proceeded to take into consideration an Act of Congress, entitled: "An Act to "provide for the settlement of claims of widows and or- "phans, barred by the limitations heretofore established, "and to regulate the claims to invalid pensions," and were thereupon unanimously of opinion and agreed, "that, by "the Constitution of the United States, the government "thereof is divided into three distinct and independent "branches, and that it is the duty of each to abstain from "and oppose encroachments on either."

April, 18, 1792, the Circuit Court for the District of Pennsylvania, consisting of Wilson and Blair, Justices, and Peters, District Judge, made the representation to the President: "To you it officially belongs to take care that "the laws of the United States be faithfully executed. "Before you, therefore, we think it our duty to lay the "the sentiments which, on a late, painful occasion governed "us, with regard to an act, passed by the legislature of "the Union."

"The people of the United States have vested in Con- "gress all the *legislative* powers, granted by the Constitu- "tion."

"They have vested in one supreme court, and in such "inferior courts as Congress shall establish, the *judicial* "*power* of the United States."

"It is worthy of remark that, in Congress the *whole* "legislative power of the United States, is not vested. "An important part of that power was exercised by the "people themselves, when they ordained and established "the Constitution."

"This Constitution is the Supreme Law of the land."

"This supreme law all judicial officers of the United "States are bound, by oath or affirmation, to support."

"It is a principle, important to freedom, that in govern- "ment, the judicial should be distinct from and indepen- "dent of the legislative department. To this important "principle the people of the United States, in forming their "Constitution, have manifested their highest regard."

"They have placed *their judicial power, not in Con-* "*gress, but in the courts.*" * * * *

"Congress have lately passed an act to regulate, among "other things, the claims to invalid pensions."

"Upon due consideration, we have been unanimously "of the opinion that, under this act, the Circuit Court, "held for the District of Pennsylvania, could not proceed." * * * *

June 8th, 1792, the Circuit Court for the District of North Carolina, consisting of Iredell, Justice, and Sitgreaves, District Judge, represented to the President that the court would not obey the act, and, among other things, state, "that the extreme importance of the "case requires them to state the principles beyond the pos- "sibility of being misunderstood," and proceed:

"The Legislative, Executive, and Judicial departments, "are each formed in a separate and independent manner, "and the ultimate basis of each is the Constitution, only, "within the limits of which, each department can alone "justify any act of authority."

Thus we see that Judges Jay, Cushing, Wilson, Blair

and Iredell, constituting the entire supreme court, in connection with District Judges Duane, Peters and Sitgreaves, proceeding with the greatest deliberation, yet, jealously and firmly did resist the first encroachment of the Legislature. And Congress endorsed their action, and withdrew from the attempt.

They were cases of principle, a jealous declaration by the "Inferior Courts," that the legislative power was limited by the grant, that an important part of it was exercised by the people in enacting the Constitution, and was reserved to them. But that, as judicial power could never remain inaccessible in a free country,—as justice and right must never be denied, neither delayed nor put off, to any man,—the whole judicial power to remedy every wrong, was vested in one supreme court and such inferior courts as Congress should establish.

The judicial power, extending to this case in equity, is the only power that can remedy this irreparable injury.

An ultimate injunction, forbiding the collection of the tax, is the only remedy that is adequate.

If the courts ever had the power to grant an injunction in such a case, they derived their power from the *legislation of the people.* The people granted to Congress power to establish courts, but themselves legislated on their powers; and, then, not only did not grant any power to Congress to circumscribe the judicial power, but expressly reserved it, and, as our case decides, left the "ulti-" mate basis of the power in the Constitution only."

SECTION V.

We have no remedy at law, and this remedy is guarantied by the Constitution.

We come into equity because we have no remedy at law. If a remedy was provided at law, equity would have no jurisdiction; therefore, if the Congress can take away our remedy, it can nullify Magna Charta and the Constitution, and compel the courts to deny justice and right.

We have no remedy at law, even though the assessor and collector were liable in trespass;—if money is paid to the collector, it will be paid over to the United States, which is above law; and we have then, at best, only an action against the agent, a mere shadow of the remedy for our right to keep our money.

Osborn v. *U. S. Bank*, 9 Wheat., 738.

In this case, Ohio taxed the Bank $50,000 if it should continue to do business within the State; and the auditor issued the warrant, which was levied; and the court held that a right of action against a private individual was but the shadow of a remedy for the transfer of the property of the Bank to the State, which is above law.

The question really is: Can the legislature enact a void statute and set sufficient power to work to execute it, and then, to make its usurpation effectual, deprive the citizen of the protection of the courts? Can it arbitrarily destroy life or liberty, or divest property and, by taking

away the remedy, evade the plain provision: "No man "shall be deprived of life, liberty or property but by the "judgment of his peers or the law of the land?"

Suppose it enacted that any person who shall steal from any member of Congress, may be killed, and any person who shall kill any one whom he shall believe guilty of such theft, shall receive a reward of $1,000, and no criminal prosecution shall be maintained against such homicide. Or, suppose it enacted that any person who shall be suspected of forgery, shall be arrested by the marshal, without warrant, and imprisoned for two years, and no petition for a writ of *habeas corpus*, or for release or trial, shall be entertained by any court, nor shall any court in any manner take cognizance of the imprisonment. Or, suppose it enacted that, if any person shall issue counterfeit money, the marshal shall forthwith seize his property and deliver the same to the United States, and no suit to restrain such seizure shall be maintained in any court.

In all these supposed cases the statute would only take away one remedy; the action of trespass could be maintained against the wrong-doer, and it could not be said to be a right without a remedy. Could not? Let us analyze the matter:

In the first case, the man had the right to life, and, by the law of nature, had the right to the protection of society. Is the remedy for damages, which his dependants would have, any remedy for his right to life and protection?

In the second case, he had a right to liberty. Could any action for damages compensate him for years of imprisonment? Could the goods of a millionaire make amends for a blasted life? Would not turning him over

to such a remedy, be a refinement of despotic tyranny worthy of a Caligula?

In the third case, he had the right to be deprived of his property, only by the judgment of his peers or due process of law. Is a right of action against the marshal a remedy for having all his property seized and delivered, by the marshal, where the law cannot reach it?

If the marshal is rich, is it certain that damages can be collected of him, after months of litigation, upon a judgment?

Is an uncertainty a remedy for a certainty?

Can anything, in any of these cases, protect the citizen but the immediate interposition of the courts?

He has the right to protection; *for that, he joined society.* Can society rob him, and refuse him protection; strip him naked, and then say he has a remedy, because he has left to him a bare claim to an uncertain and distant recompense?

I have no sympathy with a man who would offer such a remedy in such a case. It is a reason, worthy of the Scholiasts and Sophists of the middle age, worthy the ministers of the Prince of lies, who clothe a treacherous doctrine with the form of law, and seek in angels' forms and judicial ermine, alike, ruin and wrong alone.

The cases of *Payne* v. *Hook*, 7 Wallace, 430, and *Watson* v. *Sutherland*, 5 *ib.* 74, support the right clear, practical, efficient and prompt, and decide that such is the remedy intended, and of right.

Admit, then, that the act which lays this tax, is unconstitutional, and the case is the same.

The Constitution says, the property shall not be taken but by due process of law; and the legislature abrogates it and says, no court shall stay a seizure, made without law.

If any one say, we have a remedy here, let him, if his son ask bread, give him a stone; or, if he ask a fish, let him give him a serpent,—his acute reason will give him an approving conscience, if the weight of the stone, or the venom of the serpent, remedy forever the hunger of his child.

But, we have no remedy against the assessor. He is not a trespasser, inasmuch as he me merely obeys the statute. He originates nothing, commands nothing, has no discretion, can exercise no judgment. Congress sets the trespass in motion and commands the assessor to do a mere ministerial act. He cannot sit to decide constitutional questions and nullify statutes by refusing to obey them.

If the assessor or collector had any discretion in the matter, and exercised that discretion to the injury of the plaintiff, they would be liable; but a ministerial officer is bound to obey the command or warrant of his superior, which appears regular upon its face, and concerns a matter and parties within the cognizance of the power which issues it; and the writ, though void, will protect him.

Savacool v. *Houghton*, 5 Wend., 170.
Chapman v. *Dyett*, 11 Wend., 32.
Cary v. *Curtis*, 3 How., 247 and 249.

I leave this text as written, for the case of *Philadelphia* v. *The Collector*, 5 Wallace, 720, carries the remedy as far as it is possible, and leaves it liable to be defeated by the slightest change in circumstances, in the annually changing statutes.

The statute, as to the 50 cents tax, is so prepared as to protect the assessor altogether: The assessor makes the computation, but, for aught that appears in the statute, he cannot issue a warrant. His trespass is negative in computing the void tax with valid ones, and returning the total amount; the collector proceeds under the warrant of the statute, to levy and collect the whole.

The United States and its officers are wronging us, taking our property by force, without right. We have a right to protection *against them*, either by injunction or action against the actor. We cannot have an action, therefore we must have the injunction; or we have a right against the actor, without a remedy.

A man who would sell dangerous steam boilers, might be amenable for the injuries they would do. Yet, this collateral action would be no remedy against the purchaser who wilfully uses and explodes them, to the injury of the lives, limbs or property of others.

In the case at bar, however, we have seen that the remedy against the officers would be, in part, very doubtful; against the real actor, the United States, no action would lie.

And, further, if these officers act under the commands or rules of the department, they will not be liable to exemplary damages.

Tracy v. *Swartwout*, 10 Peters, 94.

Yet, these damages are given in the case of trespasses, as a sort of compensation for wrongs which can not be computed in money, are proportioned to such wrongs as nearly as may be, and are given as a remedy. Unless these wrongs can be prevented, they *must* be endured without possible remedy.

We have seen the State Courts have no jurisdiction over the subject matter. This is the only court of chancery of original jurisdiction, competent to afford the relief prayed.

SECTION VI.

The Source of Judicial Power is the Constitution alone: and the Power is Complete in the Courts.

Quite a number of cases have been decided in favor of exercising jurisdiction in those particular instances, on the ground that the statutes were sufficiently broad to give jurisdiction, if otherwise, they were without it. And in the case of *McIntire* v. *Wood*, the power to issue a mandamus *in that case*, was denied,—

1st. Because there was another, complete and adequate remedy.

2d. Because the legislature had not delegated the power to the circuit courts. And *McClung* v. *Silliman* affirms this case, and adds another point, viz: that State Courts have no power over Federal officers.

The second point, *i. e.*, that the legislature had not given the power to the circuit courts, was not necessary to the decision of the cases. Yet, it cannot be denied that it expresses a position, tacitly assumed to be correct in many cases, viz.: That the powers of the courts were derived from the grant of Congress, and only existed by virtue of its delegation.

It is true, however, that it was not necessary to a decision of any of the cases, above referred to, to define the power of Congress in the matter. It was sufficient in all, but *McIntire* v. *Wood*, that the statutes of Congress had

declared that they should exercise certain powers; and if Congress had power to enact declaratory acts, the question, as to whence the power was derived, need receive no careful exposition if the case was within the judicial powers of the United States, granted in the Constitution.

In one case only (*Marbury* v. *Madison*) was it necessary to enquire, even, whether the power existed, (in all others, but *McIntire* v. *Wood*, it was admitted,) and the court rendered its decision thus (1st *Cranch*, 154): "In the "order in which the court has viewed this subject, the fol- "lowing questions have been considered and decided:

"1st. Has the applicant a right to the commission he "demands?" The decision is affirmative.

"2d. If he has a right, and that right has been violated, "do the laws of his country afford him a remedy?" The decision is affirmative.

"3d. If they do afford him a remedy, is it a mandamus "issuing from this court?"

This is answered, p. 173. It is a mandamus; and it only remains to be inquired, "Whether it can issue from this court." And the decision is, that the jurisdiction of the Supreme Court is appellate only, and, as a necessary sequence from the affirmative replies, that the courts which are not exclusively of appellate jurisdiction can grant this remedy.

Marbury v. *Madison*, decided that the laws of his country afford him the remedy. *McIntire* v. *Wood* and *McClung* v. *Silliman* decide that the statutes of Congress do not afford him a remedy.

Either his remedy is afforded by a law of his country, outside and independent of congressional enactment, or *Marbury* v. *Madison* is not law.

The necessities for such remedies in our happy country were few, and the cases small, so that no one has undertaken to go to the foundation, and attempt to obtain an authoritive and direct decision as to the question, whether *Marbury* v. *Madison*, was. or was not law. And the bar seems to have settled, quietly and without reasoning, to the opinion that the powers of the courts are derived solely from the grant of Congress.

While the answer to the questions could be, that the statutes had given, or declared the power and remedy, it was not necessary to go farther;—but here the position is, that the statutes have not given or have taken away, the power to afford a remedy for an acknowledged and vested legal right; and we must go on, and try the statutes themselves, in the one case, and examine the source and extent of power, in both.

From the magnitude and importance of the subject, I approach it with diffidence. Because I believe that duty compels, I present it.

"The Congress shall have power * * to constitute "tribunals inferior to the Supreme Court."

This word' "constitute," means originally to set, or fix. 2d, to form or compose, or to give formal existence to (tribunals), and 3d, to appoint to an office or employment.

The word, "tribunals," undoubtedly means courts of justice.

A court is nothing without its process.

A court will not take cognizance of a cause, not brought before it by regular process.

Wilson v. *Daniel*, 3 Dallas, p. 410.

Hence it follows that if a court is constituted, it has, as the necessary adjunct of its existence, the power to issue such process as is necessary to bring before it, cases for adjudication, and to carry its judgments into effect.

And this power, if it exists, at all, is necessarily complete and sufficient for all cases cognizable by it.

The only answer to this position is of this purport:

The court, being no tribunal until it has the means of bringing or having brought before it cases for judgment, is not constituted, and is not a tribunal till these means are provided; and the provision of these means is the last act in forming its existence. And the means given may be limited by the power which constitutes the court.

To this answer we say, *first*, it is insufficient upon precedent.

Two precedents are found in the opinion delivered in *Jennings* v. *Carson*, 4 Cranch, 1 p. 22, by MARSHAL, C. J:

"It appears that the court of New Jersey, which con-
"demned the George and her cargo as prize, was estab-
"lished in pursuance of the recommendation of Congress,
"and that no legislative act had prescribed its practice or
"*defined its powers* (in 1780). The act produced in court,
"was passed at a subsequent period, and consequently
"cannot govern the case. But the court cannot admit the
"correctness of the argument drawn from the act by the
"counsel for the plaintiff in error. It cannot be admitted
"that an act defining the powers, and regulating the prac-
"tice of a pre-existing court, contains provisions altogether
"new. The reverse of this proposition is generally true.
"Such an act may rather be expected to be confirmatory
"of the practice and the powers really exercised."

"This reasoning is illustrated, and its correctness in a "great measure confirmed by the legislation of the United "States, and the judicial proceedings of our own country."

"By the Judicial Act, the District Courts are also "Courts of Admiralty, and no law has regulated their "practice. Yet they proceed according to the general "rules of the Admiralty, and a vessel, libelled, is always in "possession of the law."

From this it appears that the New Jersey Court was fully constituted, though no statute gave it any process or defined its power; and from the whole opinion it appears that this establishment was an appointment to the office or employment of administering justice, and the court, fully constituted by being barely called into existence, exercised as its right judicial powers through process, usual, and adapted to such cases as it was to adjudge.

This was in 1780, and shows quite conclusively what, at that time, it was deemed necessary for a legislature to do, in order to constitute a court.

It also appears that, in the year 1800, the district courts had, for eight years, exercised the powers and administered adequate remedies in admiralty, not by virtue of any delegation of process from Congress, but because they had been constituted Courts of Admiralty.

From this contemporaneous construction,—extending ten years before and ten years after the enactment of the Constitution,—it seems clear that its framers did not intend or suppose that a court, which would be a cypher, a ten, a tenth, an infinitely small fraction, or an infinitely large quantity, would be constituted according as Congress should attach units of process to the left or right of the cypher, or

should fail to perform, for it, this final act of constitution or creation. It is clear that they believed that a court of admiralty could be constituted, and though no statute gave it process, could bring cases before it for judgment in admiralty, and execute its decrees.

And that they also must have believed that courts of under the Constitution, framed by them to establish justice could be constituted, which could administer justice, without any express grant of process from any source.

And from the language of the whole decision, it appears that the power to regulate process, was not given to Congress by the provision authorizing it to constitute courts.

Second. The answer is insufficient upon principle and upon the only reasonable construction of Art. 3 of the Constitution:

"The judicial power of the United States shall be vested "in one supreme Court, and in such inferior Courts as the "Congress, may, from time to time, ordain and establish. "The judges both of the supreme and inferior Courts, shall "hold their offices during good behaviour; and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in "office." (Art. 3, Sec. 1.)

"(1.) The judicial power shall extend to all cases in "law and equity, arising under this Constitution, the laws "of the United States, and treaties made, or which shall "be made, under their authority; to all cases affecting am-"bassadors, other public ministers, and consuls; to all "cases of admiralty and maritime jurisdiction; to contro-"versies, to which the United States shall be a party; to "controversies between two or more States, between a

" a State and citizens of another State, between citizens of " different States; and between citizens of the same State " claiming lands under grants of different States; and be- " tween a State, or the citizens thereof, and foreign States, " citizens or subjects." (Art 3, Sec. 2, (1.)

" In all cases affecting ambassadors, other public min- " isters and consuls, and those in which a State shall be a " party, the supreme Court shall have original jurisdic- " diction. In all the other cases before mentioned, the " supreme Court shall have appellate jurisdiction both as " to law and fact, with such exceptions, and under such " regulations, as the Congress shall make." (Article 3, Sec. 2.) (2.)

The judicial power of the United States, extending to all cases in law and equity arising as designated, and to all the other controversies designated, shall be vested in one supreme Court, and in such inferior Courts as the Congress may establish. In a few cases, the supreme Court shall have original jurisdiction; in all the others it shall have appellate jurisdiction.

Upon the appellate jurisdiction, it was said in the case of *Durousseau* v. *U. S.*, 6 Cranch, 307, (A. D. 1810) p. 318:

" It is contended that the words of the Constitution " confer an appellate jurisdiction in this court, which ex- " tends to every case not excepted by Congress; and that " if the court had been created without any express defini- " tion or limitation of its powers, a full and complete ap- " pellate jurisdiction would have vested in it; which must " have been exercised in all cases whatever.

" The force of this argument is perceived and admitted.

" Had the judicial act created the Supreme Court with- " out defining or limiting its jurisdiction, it must have been

" considered as possessing all the jurisdiction which the " Constitution assigns to it.

" The legislature would have exercised the power it " possessed, of creating a supreme court, as ordained by the " Constitution, and in omitting to exercise the right of ex- " cepting from its constitutional powers, would have " necessarily left those powers undiminished. The appel- " late powers of this court *are not given by the judicial act*; " *they are given by the Constitution.* But they are limited " or regulated by the judicial act, and by such other acts " as have been passed on the subject."

Observe here that the right to limit the appellate powers *is expressly given* by the Constitution, and *no power* to limit the power of original jurisdiction of either the inferior or supreme court, is given by any provision; nor is it necessary, to carry into effect the powers granted. And, further, that constitutional provision was necessary to take away the power of original jurisdiction in cases to which a State is a party, or to control the construction of the power granted. (Amendment XI.)

Observe, again, the article, giving the judges of the supreme and inferior courts (neither of which were then created) the same tenure of office, and the same permanency of compensation, giving to both supreme and inferior courts (neither of which were then created) the judicial power extended to all cases; providing that the jurisdiction of the supreme court should not be original, in any but two classes of cases, but that it should be appellate in all the other cases mentioned;—and can we hesitate to say that this article contemplated a judicial system, consisting of courts of original and appellate jurisdiction which did not

then exist; that where, in the first section, it gave the judicial powers to the supreme Court as an appellate court in all but the excepted cases, and original jurisdiction as to them, it gave corresponding powers as to the other courts named; and that they must, in the language of the court, be considered as possessing all the jurisdiction which the Constitution assigns to them, viz: original jurisdiction, and the judicial power of the United States in the cases named.

Wilson v. *Mason*, 1 Cranch, 91 and 92.

This appears to be the doctrine of

Marbury v. *Madison*, 1 Cranch, 154.

Third. The third answer to the position taken is, that the very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury; and that "all possible injuries "whatsoever, that do not fall within the exclusive cogniz- "ance of either the ecclesiastical, the military or maritime "tribunals, are for that very reason within the cognizance "of the common law courts of justice." (For authorities see *Marbury* v. *Madison*, cited ante). I will show, hereafter that the courts of original jurisdiction are, as to the cases mentioned in the Constitution, common law courts of justice.

SECTION VII.

From these points it appears that the inferior courts of the United States have complete power, in all cases, and between the parties named in the Constitution, to grant a remedy for every wrong.

1st. Because such power is incident to their existence, and was exercised by courts, constituted both before, and under the Constitution, without any delegation whatever, from the legislature which created them.

2d. Because in all cases under the Constitution, the laws and treaties of the United States, and in all cases between the parties named in Art. 3, S. 2, for purposes of original jurisdiction, the whole judicial power of the United States is, by the Constitution, delegated to them.

3d. Because this is the only construction of the Constitution, which can accomplish its objects, can establish justice, secure the essence of civil liberty, perpetuate common law security, which every one of its framers had before that, time enjoyed, and avoid the monstrous absurdity that in attempting to frame a free government, the people not only divested themselves and their posterity, but actually threw away the very essence of civil liberty.

The power to regulate process, is derived from the grant to Congress, of the power "to make all laws, necessary and "proper for carrying into execution all powers vested by "the Constitution in the government of the United States, "or in any department or officer thereof." (Art. 1, Sec. 8, (18.)

We have seen that the whole judicial power of the United States is vested in the courts; and we now come to the inquiry: What powers of regulation, control and limitation, has Congress over the subject? And we find that its powers of regulation are exceedingly ample: If it shall be necessary and proper to carry into execution the power granted to the courts, Congress may divide the country into districts and establish courts in each, with judges, clerks, commissioners, masters and other officers requisite to complete mastery of the business of the court. It may establish appellate courts, inferior to the supreme court, may regulate appeals to the supreme court, and except, from the jurisdiction of that court, all or any cases, which the objects of the Constitution shall not require to be decided by the highest judicial authority in the land.

Uniformity of process, and arrangement of terms and forms, so as to be particularly adapted to the circumstances and characters of the people and their grievances, are desirable to carry into effect the powers delegated to the judicial department,—and Congress may regulate them for that end.

In short, Congress may make any law which shall carry into execution the powers vested, by the Constitution, in the judicial department.

But can Congress make any law, limiting the powers vested in the judicial department, or, to prevent their execution? or can it by any act deprive the courts of any portion of the whole judicial power of the United States?

The answer is, It cannot.

The Constitution did not constitute, ordain or establish a supreme court; it did not even name it, but provided for its jurisdiction, leaving to Congress to create it, name it, and arrange every detail of its constitution.

Nor did the fundamental law constitute, ordain, or establish tribunals inferior to a supreme court; it only provided for their jurisdiction, leaving to Congress to arrange every detail of their constitution—that is, every detail but two: (1) the appointment of the judges, and (2) their tenure of office and compensation.

But the Constitution vested in this department, the judicial power of the United States.

If Congress can limit the power, or take away any portion, it can take away the whole, and divest what the people vested.

One argument grotesquely claims the right of Congress to divest the courts of judicial power, under the provision that Congress shall have power to constitute tribunals inferior to the supreme court, and make all laws necessary and proper to carry this power into execution.

To constitute a "tribunal," that is, a court of justice, a seat and forum of judicial power.

To "constitute" it; that is, to set, to fix, to place, to give formal existence to it;—and this argument grotesquely urges that this is an authority to unseat, displace and destroy the formal existence of this judicial power itself.

It seems to me that it is quite the contrary. The judicial power is beneficial to all the people; and the people in their absolute grant intended to give its benefits to all the people, as fully as they or their ancestors had ever enjoyed the benefit of judicial power.

They granted it to the judicial department, and vested in Congress the power to make all laws necessary and proper to carry this judicial power into execution. But they did not grant to Congress the power to prevent the carrying into execution of this power, by any means whatever.

It will not be claimed that Congress can directly destroy the judicial power of the United States, and, if it cannot do it directly, from defect of power, it cannot indirectly.

Wayman v. *Southard*, 10 Wheat. 1, p. 50.

And there can be no more perfect destruction of judicial power than to so forbid or prevent the means necessary, that, in a case of complete, absolute and acknowledged right, it is absolutely powerless to afford a remedy.

SECTION VIII.

The Courts of Original Jurisdiction are, as to all the cases mentioned in the Constitution, Common Law Courts of Justice.

The Congress shall have power to constitute tribunals inferior to the supreme court, was the enactment of the people, and the delegation of their authority.

Again, they said, the judicial power of the United States shall be vested in the courts.

And again, by an almost contemporaneous amendment, no person shall be deprived of life, liberty or property, without due process of law.

It is clear that by Tribunals, they intended courts, and that whatever power the courts should exercise, should be judicial power, and that the exertion of this power should be through due process of law.

There had existed many kinds of laws, and tribunals for their administration:

The laws of the Medes and Persians were fixed, and the nation prospered and became great under them. Infidelity has doubted the miracle; but history has shown indisputably that the code of laws, the tribunal, the judicial power, and the "process" of this nation, is clearly mirrored in the 6th Chapter of Daniel, and that Daniel himself was deprived of his liberty and cast into the Lion's den, upon a deliberate decision of the judicial power, that he was

guilty of a crime against the law of the land, and must suffer the penalty, to which he was then consigned, by due process of law. The proceedings against his accusers appear to have been less deliberate, and, whether they were eaten, in the due course of Persian justice, does not clearly appear; but, accepting even the more favorable exhibition in the deliberate condemnation of Daniel, we are certain, the people, in framing the Constitution, did not have in mind any such tribunal, judicial power or process, as that of the Medes and Persians; and we must reject any interpretation of the words which would put on them a meaning clearly not intended by the parties adopting them.

It is not denied, either, that the arrest and trial of Christ was had according to due course and process of the mixed jurisdiction of Roman and Jewish law. The process of arrest was, according to the usual custom of arresting thieves, by military order; the trial was before a court, organized to convict, and which sought false witnesses against him, to no effect; but having found constructive treason in a few words, continued their judicial functions and examinations by spitting in his face, buffeting, smiting and taunting the prisoner.

Travellers in the East say that this account is not exaggerated, and that in many nations, to this day, such are regarded as the regular and proper exercises of solemn judicial trial.

It seems, however, that this court was divested of one essential element of judicial power, *i. e:* the power of execution, and that the accused had to be taken before the Roman Court, which had full power and jurisdiction in the case.

From the report of this case, as we find it in 27th Matt., it appears that this Roman Court allowed to the accused

the presumption of innocence, upon trial *acquitted him*, then awarded execution, and tortured and hung the defendant.

It is quite evident that the people, in the Constitution, did not intend rabbinical law or tribunals, much less Roman Provincial law and Judicial Power, or much less the poetic justice of Herod, who, for his oath's sake, and impelled by his duty to keep it, beheaded John, and in due course of law executed James, first, and tried him afterwards.

Nor did the people intend to perpetuate the ostracisms of the Greeks, or the political judgments, rendered by ballot in early Rome.

The tribunals of Patrician Senators and the rescripts of Emperors were not to be, for them, tribunals or judicial powers.

Trials by ordeal, torture or inquisition; the courts and so called judicial proceedings of kings and potentates in the middle age, trials by Courts of Commission, like those of Empson and Dudley,—none of these were associated in the minds of the people with the names of Courts, judicial power and due process of law; nor were the tribunals, then in use all over Europe, where the justiciary questioned the parties, and pronounced judgment from his impressions only,—intended by them, when they spoke those well known words.

Of this I speak confidently; for, the people of every State, and their ancestors, from time whereof the memory of man runneth not to the contrary, had been accustomed as jurymen to form an integral part of courts, had invoked and experienced judicial power, had administered, witnessed and been coerced by due process of law. Not one of the original States had held the civil code, and in every one, without diversity, the same general ideas were conveyed by the words, court, judicial power, and due process of law.

If any one doubts this, let him go through the United States to-day; and as the conditions are the same now as then, he will find the answers now as then; except that, separated farther from England, the prerogative power of the king in court will be a little less clear. Now, as then, he will ask a people, who, as jurymen, have been accustomed to form an integral part of courts, have invoked and experienced judicial power, have administered, witnessed, and been coerced by due process of law.

The words to day, have a usual and commonly received meaning, and they had then: and in construing the statute of the people, the plain, usual and commonly received meaning of the words, must be adopted by the courts.

The ideas, called to their minds, and their understanding of the words, made them only to designate common law judicial power, common law process of law; not common law, as tehnically distinguished from equity and admiralty; but as designating all courts, judicial power, and due process, which had existed from time whereof the memory of man runneth not to the contrary, in the States, Colonies and Mother Country.

Whoever denies this application of the doctrine, either claims that the people did not know the meaning of the words, and that, in using them, they acted as one walking in his sleep, aimlessly; or that they were familiar with all systems, powers and processes, which anywhere had, or could bear the names, and intended to give to Congress, a wild, errant, and extravagant power to select among them all, or to experiment and create a novelty to be christened by the ancient names.

Without external authority, and without passing beyond the clear meaning of the words, we have found our propos-

ition true; but we will accumulate authority and look beyond the words themselves, to others, coupled with them in the Constitution.

We find that the judicial power shall extend to all cases, in law and equity,—this division, is a division of administration, known only to common law courts, and common law judicial power. The words are technical, and their technically received application coincides with the commonly received meaning of the judicial power and courts, to which they are affixed;—the application of the power is complete, and covers all cases, arising under the Constitution and the laws, and treaties of the United States.

The delegation of power extends beyond, and, in cases over which an appellate power was granted to the supreme Court, gives to the inferior Courts original jurisdiction in controversies between citizens of different States, in cases not arising under the Constitution, treaties or laws of the United States.

In every State, the bulk of their law was the common law, the statutes were very few; and the bulk of controversy between citizens of different States were those questions of common law, to be decided by the common law, or ignored, according as these courts, judicial powers and process, were vested with common law jurisdiction, or without it.

The trial of all crimes shall be by jury. A jury, then, is to form an integral part of these courts, and to receive and exercise the judicial power. It is demonstrated from authorities, now firmly fixed, that nothing but a common law jury can satisfy the requirement of this provision. All crimes are to tried by jury; that is by the common law tribunal for the trial of crimes.

The writ of *Habeas Corpus* shall not be suspended. When or how was this "writ" ever granted to the courts?

Why does the Constitution presume that the courts will have the power to issue the writ, at all? It cannot, certainly, intend to confine itself to State courts, for they have no jurisdiction to release persons, in custody of United States courts, under United States laws. Nor can it be anticipated that Congress will give it,—a strictly common law remedy,—to their novelties, if they have a *carte blanche* in the matter of making tribunals.

It was a power inherent in courts of common law,—it existed then as a power (in abeyance perhaps, for want of courts to exercise it), a power which should not be suspended but because of the special danger. If it required a special Act of Congress to vest it in the courts, Congress could suspend it, indefinitely, without cause, by mere inaction.

The Constitution says, nothing shall suspend it, and, of its own action destroys the effect of any inaction of Congress, recognizes it as an existing, unsuspended constituent of the judicial power, and vests it in the courts. Not in the Supreme Court alone, for under *Marbury* v. *Madison*, except in the cases of ambassadors, &c., that court has not original jurisdiction; but as this judicial power extends to all cases arising under the Constitution, it must be, and is, vested by the Constitution directly in the courts of original jurisdiction, or exists in them as a necessary constituent, without grant; for, if not, then, notwithstanding the Constitution, the writ of *habeas corpus*, in some cases arising under the Constitution, might have been indefinitely suspended, without any cause, from mere inaction or inadvertance of Congress.

Presentment and indictment were prescribed only by common law; and for due process of law we have been referred back to Magna Charta and Lord Coke's commentaries, for its definition, and to the common law precedents.

In suits at common law, the right of trial by jury shall be preserved, and no fact, tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Common law, *habeas corpus*, indictment and presentment by grand jury, and trial by jury, in all cases of crime, re-examinable only according to the rules of common law, suits at common law to be tried by jury, and, finally, no man shall, as a penalty for crime or to pay a debt, be deprived of life, liberty or property but by due process of the common law.

Now, what is a common law court of justice? Is it not one which administers common law remedies for common law rights, according to due process at common law? If so, the Constitution has sustained our postulate.

And if the common law was fully recognized as a living, existing reality by the Constitution, then common law rights, to complete remedies for every wrong, exist under the Constitution, and, if they exist, may be administered by the conservator of the judicial power of the United States.

If they exist fully in the courts, our demand has been properly made on them. If they do not exist in the courts but, as stated in *McClung* v. *Silliman*, exist in Congress, not delegated to the courts, then Congress must hear our prayer, judicially ascertain our rights and grant us an injunction; for, if the common law exists as a living reality, recognized by the Constitution, the remedy which the common law provides for every wrong, exists, and can be exercised by the conservator thereof.

That Congress fully recognized the existence and binding force of common law, and the perpetuity of all its essential features, appears in scores of places in the Judiciary Acts of 1789, 1791, and 1792. I will not weary the court with the recitals.

SECTION IX.

Having determined that the common law, as a system of principles, forms the substratum of all our laws, and occupies that wide space which the statute does not, or cannot occupy, and furnishes the rules of security, liberty and property, which regulate society, and determine the rights of persons and things in general.

Having determined, also, that the words: tribunals, courts, judicial power, and law of the land, had fixed and definite meanings, in which they were used, which were derived from the customs and books of our ancestors, in this country, and, more especially, in that country from whence we originally derived our knowledge of the administration of the common law, through courts of justice,—we shall gather additional light upon the meaning of the words used, the sources of the powers vested, the extent of the powers, and the manner of their exercise, by recurring to them as they appear in authorities and history, in that country.

First noting the definition given by a lexicographer in our own country, where the rapid accumulation of population in the older States, has called into existence a vast number of courts, and their creation has become an almost every day affair: Mirroring the popular idea, Bouvier defines a court to be an incorporeal political being which requires for its existence the presence of judges, a clerk, a time and place, when and where it is authorized to

be held, and the performance of some public act, indicative of a design to perform the functions of a court.

We proceed now to England.

According to Lord COKE, a court is, a place where justice is judicially administered. (*Co. Litt.*, 58 *a.*)

But as BACON has developed the principles more in detail, and with such truth that they have never even been questioned, we will take as our text quotations from the ABRIDGMENT, under the title "courts."

SECTION X.

Under this title, division (A.) shows, very briefly, the history of courts, from the *witten-agemote* of the Saxon, through the time of William the Conqueror, to the original "of our courts, as we have them this day in West-"minster Hall. To give countenance to this new erection "and division of courts (which was completed by Edward "I.), and also that it might still be seen that all justice "flowed from the king, the king himself sat in person in "the Court of King's Bench. (*Speed*, 521; *Roll. Abr.*, "535.) But, though the king was sometimes present, yet "the Chief Justice gave the rule, that the king might not "decide in his own cause.

"It is still supposed to have always the king himself sit-"ting in it. (*Dyer*, 187, *pl.* 6. *Crompton on Courts*, 88.)

"But however this regulation might have begun, or "however it might have been formerly, as to the king's "sitting and determining causes, it seems now agreed, *that* "*the king, having delegated his whole judicial power* to the "judges of his several courts, those judges, by the long, "constant and uninterrupted usage of many ages, *have now* "*gained a known and stated jurisdiction, regulated by cer-*"*tain and established rules, in which the king himself can-*"*not make any alteration without an Act of Parliament.*" (2 Inst. 73; 2 Hawk., P. C. 2.)

"*But as the king is the fountain of justice* * * no "court, whatsoever, can claim any jurisdiction unless it "some way or other derive it from him."

From this it appears, 1st. That all justice distributive flowed from the king.

2d. That, though present, he never delivered it in person under the present form of courts, but the judge.

3d. That the king has delegated his whole judicial power to the judges of his several courts.

4th. That by the long, constant and uninterrupted practice of many ages, the judges have gained a known and stated jurisdiction, which cannot be changed without altering the Constitution of England.

5th. No court whatever can claim any jurisdiction, except that derived by it from the fountain and source of justice.

6th. That, as the king had, originally, the prerogative to dispense justice for every case, and has delegated his whole judicial power to the judges of his several courts, who have a known and stated jurisdiction, which cannot be changed but by a change of the Constitution, and no court has any jurisdiction from any other source,—there can be no failure of justice, because the whole system has all the original, absolute judicial powers of the king; and this system, with its absolute judicial power, was the constitutional right of every Englishman.

We have seen that the colonists brought with them to America every right which they or their ancestors had ever possessed in the Mother Country, (*Decl. of Independence*), that a special grievance was, that the full and complete system of judicial power was denied to America, and that they claimed and had a right to trial by a jury of the vicinage, in every criminal proceeding, and a complete and accessible remedy at law for every wrong.

SECTION XI.

"The king himself, though he be entrusted with the "whole executive power of the law, cannot sit in judg- "ment in any court, but his justice; and the laws must be "administered according to the power committed to, "and distributed among his several courts of justice. (4 *Inst.*, 70, 71; 2 *Inst.*, 103, 8 *H.*, 4, 13, *b.*; *S. P. C.* 54; *Dalt.*, *c.* 1.)

"All judges must derive their authority from the Crown "by some commission warranted by law, * * *and* "*now, for the greater security of the liberty of the subject by* "12 *and* 13, *W.* 3, *C.* 2, *their commissions are to be quam-* "*diu se bene gesserint.* * * *

"* * The judges are bound by oath to determine ac- "cording to the known laws and ancient customs of the "realm, and their rule herein must be the judicial de- "cisions, and resolutions of great numbers of learned, wise "and upright judges, upon a variety of particular facts "and cases, and not their own arbitrary will and pleasure, "or that of their prince. (Vide Statutes, 18 E. 3, C. 1; 20 "E. 3, C. 1, 2; 4 Inst., 88, 109; Dalt., 13.)

From this appears:

1st. A similarity between their sovreign and our sovreign: The King cannot sit in judgment in any court, but *his* justice; neither can the People but *their* justice.

2d. The laws must be administered according to the power committed to and distributed among his several courts of Justice. *Must*, is an absolute controlling word,

and admits no deviations for policy. *According to the power committed to*, i. e. the whole judicial power of the sovereign, which, all complete, *is distributed* among his several courts of Justice.

Read, in this light, the Constitution: The Judicial power of the United States, shall be vested in what? A system complete and perfect, and capable of receiving the whole delegation? or in one supreme Court, to which only a limited portion is distributed, and in a garbled and limited, and imperfect state only,—in an incomplete system?

Was it not equivalent to saying: as the whole judicial power in England, is vested in, and distributed among her courts, and the laws must be therein administered according to the power committed to their care,—so we, the people of the United States, to establish justice and secure liberty, do vest in, and distribute among our courts, the whole judicial power of the United States? True, Congress had to constitute the tribunals inferior to the supreme Court. Did it not constitute the supreme Court itself?

Where is the difference in their constitution? Could the supreme court ever have acted, or had a name, if Congress had not passed a law necessary and proper to carry into execution the powers, vested in the judicial department of the government? To do this the people trusted Congress; they made the outline; they delegated the power to each department; the details of arrangement to make and keep the grant of power effectual in each department they entrusted to Congress, trusting that Congress would carry out their intentions. Congress did pass the Judiciary Acts:—the portions creating the courts being original enactments, the other portions being only declaratory of existing law, or a mere distribution or arrangement

of details, to give full effect to the judicial power. Any other construction stultifies the people and criminates that First Congress,—making it a betrayer of its trust, an embezzler of the powers confided to it.

3d. We again find that all judges must derive their authority from the Crown by some commission, warranted by law.

From this it appears that a commission, issued by one power, was but the channel through which the power was derived from another.

And this is positive destruction to the argument that, because Congress may commission courts, it may limit their power. The authority was derived from the Crown; but the commissions came from some person or body which the law had empowered to designate the receiver of the authority.

4th. The greater security of the liberty of the subject is the object of prime solicitude; and the power which can give the commission, having named the recipient, is *functus officio*.

5th. The decisions of the courts must be according to common law principles, customs and laws. This was a rule of the Constitution, and could only be changed by the power that could remodel the Constitution. The authorities show it to have existed before Edward III. or Coke, at a time when the king had power to do almost everything but change the Constitution.

SECTION XII.

The division of the courts, among which the whole judicial power power of England was distributed, we find to be as follows:

"The most general division of our courts, is into such "as are of record, or not; those of record are again "divided into such as are supreme, superior, or inferior. "(Hale's An., 35.) The *supreme court* of this kingdom is "the high court of Parliament, consisting of the king, "lords and commons, and is invested with a kind of omni-"potency in making new laws, repealing and revising old "ones; and it is on the right balance of these depends "the well being, and indeed the very being, of our Con-"stitution. (Hale's An., 35.)

"Superior Courts of record are again those that are "more principal or less principal; the more principal ones "are the lords' house in Parliament, the Chancery King's "Bench, and Exchequer.

"The less principal ones, are such as are held by com-"missions of jail delivery, oyer and terminer, assize, *nisi* "*prius*, &c.; by custom or charter, as the courts of coun-"ties palatine; or by virtue of acts of parliament, and the "king's commission, as the court of sewers, justices of the "peace, &c. (Hale's An., 36.)

"The inferior courts of record, as ordinarily so-called, "are corporation courts, courts leet, and sheriffs' tourns. "Hale's An., 36," Ses 1 Johns' cases 179, 181, 2 Caines, 319.

" All these are bounded and circumscribed by certain " laws and stated rules, to which in all their proceedings " and judicial determinations they must square themselves. " (Hale's An., 35.)

" Every court of record is the king's court * * * " all such courts are created by act of Parliament, letters " patent, or prescription; and every court, having power " given it to fine and imprison, is thereby made a court of " record."

Upon this we note:

1st. The general division into courts of record and those not of record, is here well understood.

2d. A failure to remember the division of courts of record, into supreme, superior, and inferior, has probably caused the necessity for the argument of the case at bar.

The supreme Court of England is the high court of Parliament. This the people remembered when they said, the judicial power of the United States, shall be vested in one supreme Court, like Parliament, the highest court; for they remembered that which in England is ever to be remembered, that in the ascending courts of error, the real, ultimate and last resort of judicature is in the whole Parliament, King, Lords and Commons, to correct all mistakes, and repair every possible wrong. (Dwarris, 123.)

The people well remembered this omnipotence of judicial power to correct all mistakes and repair every possible wrong; and while they themselves had, like Parliament, legislative power to make any law, and judicial omnipotence to remedy every wrong, and while they vested no omnipotent legislative power in any department, they did enact that "*the judicial power of the United States shall be vested.*"

From the foregoing we see what the people considered

as a supreme Court. Though the king's prerogative power was (as has been said) exercised by the Court of Kings Bench, the supreme Court, being the highest in authority could correct its errors, and control its proceedings. The name "supreme," did not even belong to the Court; it described only its attributes.

Again: the courts were divided into this supreme, and the superior and inferior Courts, both of which were inferior to this supreme Court. And when Congress was empowered to constitute tribunals, inferior to the supreme Court, the people had in view the fact that all the courts of England were inferior to the high court of Parliament, which was the one supreme Court.

3d. As Congress was thus empowered to constitute tribunals inferior to the supreme Court, and in fact to constitute the one supreme Court itself, it is evident that when the subsequent clause vests the judicial power in one supreme Court, and in such inferior courts as Congress may establish, all tribunals inferior to the supreme Court are intended, including those technically described as superior and inferior courts of record, and also courts not of record. This appears more fully, as we see, from our author in this same connection, that courts of admiralty are not courts of record. And as the judicial power of the United States extends to all cases of admiralty jurisdiction, and as that jurisdiction is vested in the inferior Courts, established by Congress, it is clear that by the words, "inferior Courts," no limitation to inferior courts of record was intended; but all courts inferior to the one highest in authority, which might be necessary to complete the system, were within their purport.

4th. Again: as this system was complete, and as the people evidently desired that there should be no failure of

justice, they empowered Congress not only to constitute such tribunals as were then needed to receive and exercise all the judicial power granted, but also from time to time to ordain and establish such Courts as should become necessary and proper to keep the system perfect and complete; and by accepting this delegation of power, Congress was bound to exercise it, so as completely and in good faith to carry out the whole intention of the people. This affords a rule for construing what Congress has done, as we shall see hereafter.

5th. One of the rules of English constitutional liberty, to which the courts must in all judicial decisions square themselves is, that there shall be no failure of justice; some Court must of necessity have power to protect the right, and some writ must be found for the case, even though it is necessary to frame an original writ.

6th. Every Court of record, the inferior as well as the supreme, and whether created by Act of Parliament or by letters patent direct from the king,—all are the king's courts; their authority is derived from him.

This disagrees with the idea of Justice Johnson, that Congress had not vested its judicial powers in *its* Courts. The sovereign people's judicial powers are vested in *their* courts; whether created by act of Congress or by direct patent from the people, all are the people's courts, and their authority is derived from them.

SECTION XIII.

7 *Bac. Abr. title* " *Courts.*"

(D.) (3.) " The Courts of Westminster are the supe-
" rior Courts of the Kingdom, and have superintendancy
" over all other courts by prohibition, if they exceed their
" jurisdiction, or writs of error and false judgment of their
" proceedings; and everything is supposed to be done
" within the jurisdiction of the superior courts, unless the
" contrary especially appears; on the other hand, nothing
" shall be intended within the jurisdiction of an inferior
" court, but what is expressly alleged." * *

" In local actions inferior courts have a jurisdiction." * * * * *

(4.) " Inferior courts are bounded in their original crea-
" tion, to causes arising within such limited jurisdiction;
" hence it is necessary for them to set forth their authority;
" for, as has been already observed, nothing shall be
" intended within the jurisdiction of the inferior court, but
" what is expressly alleged to be so.

" Therefore, if an action is brought on a promise in a
" court below, not only the *promise*, but the *consideration*,
" must be alleged to arise within the inferior jurisdiction;
" for, a debtor who has contracted a debt, does not, by
" coming into the limits of such jurisdiction, give a court
" authority to hold plea thereof; nor is it sufficient to
" allege the cause of action within the jurisdiction of the
" court, but it must be proved upon the trial; and if the
" plaintiff proves a consideration, out of the jurisdiction, it

" cannot be given in evidence; and if it be, the defend-
" ant's counsel may propose a bill of exceptions, and upon
" such bill of exceptions, the judgment will appear to be
" erroneous.

" But here a distinction must be observed between
" counties palatine, and other inferior courts; for a county
" palatine is a general court for all the subjects of the pal-
" atinate, and not merely for all causes arising within that
" palatinate; for, if a debtor goes from a foreign county,
" into a palatinate, his obligation goes along with him, as
" much as if he went from one kingdom into another; and
" if it were otherwise, a palatinate jurisdiction would be a
" shelter and asylum for debtors, for no process but the
" supreme prerogative process runs there; and therefore
" it is determined, that, though the cause of action be out
" of the palatinate, yet, if the party be a subject of that
" palatinate, as he is by coming into that dominion, that
" the action may be brought against him there."

This long quotation is introduced to show clearly the reason of the decision, that the inferior Courts of the United States are not technically, nor in any sense, inferior courts.

Kemp's Lessee v. *Kennedy*, 5 Cranch, 185
McCormick v. *Sullivant*, 10 Wheat., 199.
Kennedy v. *Ga. State Bank*, 8 How., pp. 611 and 612.
State v. *Bank of America*, 4 Dal. 11.

Upon this we note:

1st. As every thing is supposed to be within the cognizance of a court of superior jurisdiction, and as they were the superior Courts of England, the subject matter of every violation of any right, claimed under the laws of England, was placed within their jurisdiction by the English Constitution.

2d. The Courts of the United States inferior to the supreme Court, representing and succeeding the courts of England, which were inferior to her supreme Court, had vested in them, by the Constitution, the supreme prerogative process.

3d. The Chancery was a more principal superior Court, invested with power to grant remedies, where the law could not; and if the people intended to delegate their judicial power, the full power of chancery should be found in some court or courts of original jurisdiction in the United States.

SECTION XIV.

" (E.) What is incidental to all courts in general.

" If the King grants a court, by letters patent, to a corpo-
" ration of a town, to hold pleas, &c.,—in this case, though
" there is not any clause in the patent to make a bailiff, or
" sergeant to execute the process of the court, and to return
" juries, yet, it is incident to their grant to do it, for other-
" wise they cannot hold a court."

The title (E) is as above, from which it appears that there are some things which are incident to every court; that even an inferior court may do those things necessary to the exercise of judicial power within its territorial limits; and it would follow that superior courts have, incidental to their existence, power to do all things necessary to their jurisdiction.

This brings us again to the particular question in controversy: What is the jurisdiction of the courts?

If it is to exercise the judicial power of Congress, (for so reads the case: " Congress has not delegated its judicial powers to its Courts; " 6 Wheat. 600), the subject is as intricate and perplexed as ever. If, however, we have made it clear that the courts are the people's courts, and exercise the judicial power of the United States, then they, as incident to their existence, hold, distributed among the system, complete power to afford a remedy for every violation of right, and complete protection or redress from every wrong,—just as the people could have done.

SECTION XV.

This brings us to the examination of the Judicial Acts of the United States.

Chapter 20, of the Act of 1789, passed Sept. 24, is entitled "An Act to establish the Judicial Courts of the United States."

This title seems to cover the whole United States, and the system intended by the Constitution.

The Act establishes and constitute both one supreme and tribunals inferior thereto.

Section 1, constitutes a supreme Court.

Sections 2 to 6, constitute tribunals inferior thereto.

Section 7 provides clerks; which completes the constitution of these courts; for we have seen that even a town court of a corporation, has inherent power to make a bailiff to execute its process and return juries.

Section 9 is either a grant of power or, it is not.

"The District Courts shall have, exclusively of the "courts of the several States, cognizance of all crimes, "and offences, cognizable under the authority of the Uni-"ted States, committed within their respective districts, or "upon the high seas, where no other punishment," than a small one, is inflicted.

This clause is but declaratory of the law, in excluding State Courts; for Congress cannot delegate the judicial

power of the United States to State Courts; nor could an offence, cognizable by the United States, in which the United States is a party plaintiff, be cognizable or punishable by the States.

The rest of this clause, and of the whole section, is distributive of the judicial powers of the United States, in all things, except in that which saves the common law remedy in every case where the common law is competent to give it. And the last clause, which provides that the trial of issues of fact in the District Courts, except civil causes in admiralty, shall be by jury.

The Constitutional provision is (Art. 3, Sec. 2, 3.):

"The trial of all crimes, except in cases of impeach-
"ment, shall be by jury; and such trials shall be held in
"the State where the said crimes shall have been com-
"mitted; but when not committed within any State, the
"trial shall be at such place or places, as the Congress
"may, by law, have directed."

Sec. 3, with this, directs the places of trial of crimes committed without the States.

This Section, (in accordance with the Constitution as above quoted, and the 7th amendment thereto,) merely declares the prior law. The parties were entitled to the jury trial, by the Constitution, and could not be divested of their right by express enactment, much less by silence.

Section 11, is also distributive. While Section 9 says, the District Courts shall have exclusive original cognizance of *all* civil causes in admiralty, this section distributes the judicial power of the United States in ALL *suits at common law or in equity*, and all crimes, except as otherwise provided for, to the Circuit Court.

Section 13 is mainly a bare re-enactment of Art. 3, Sec. 2, (2);—the last clause, however, regulates the appellate jurisdiction under the constitutional authority, found in the same article and section.

We, therefore, conclude that these sections are not a grant of power.

SECTION XVI.

The sections noted have constituted one supreme Court, and a system of courts inferior thereto.

The object and intent of this statute are made evident:

1st. By its title: an Act to establish THE judicial Courts of the United States,—not *some* Courts, but *the* Courts; —not the Courts of Congress, but the Courts of the United States.

2d. By the *res gestæ*;—The Constitution had placed a solemn and important power in the hands of Congress, to pass all laws necessary and proper for carrying into complete execution the judicial power of the United States, vested by it in the judicial department,—and Congress had accepted the duty. Full execution of this power was absolutely necessary to establish justice and secure the blessings of liberty, which include the rights of personal liberty, personal security, and private property. And it was of the very essence of civil liberty, that all these should find a complete and adequate remedy in courts of justice.

3d. A failure to perform all things necessary to the perfect working of this power, stultified the people, made Congress recreant to its obligations, and defeated the great design of its creation.

4th. The declaratory parts follow the Constitution, and indicate a desire and intention to carry out its powers.

5th. "The law favors liberty," and "favors a remedy."

6th. Statutes beneficial to the public shall be most liberally construed.

7th. Statutes, to carry out and make effectual a Constitutional enactment, shall be most liberally construed to that end.

In view of all these rules, yet, not forgetting that the words of the Act, if perfectly clear, are its only interperters, we come to enquire:—

1st. Whether this system of courts is capable of receiving the power to administer the whole judicial power of the United States? To this question, we believe the answer must be affirmative.

2d. Whether the power to grant the remedies in the case at bar, has been distributed to the Circuit Courts?

By Section 11, they have original cognizance of all suits of a civil nature, at common law or in equity, between the parties named, and it was enacted, 2 March, 1833, (Sec. 2, 4 Stat. 632.): The jurisdiction of the Circuit Courts of the United States, shall extend to all cases in law or equity arising under revenue laws of the United States, for which provisions are not already made.

(This Act was but declaratory of the existing law. *See Sec.* 15, *ante.*)

If the judicial power of the United States was ever actually vested in the system of courts, it can never be taken away from the system, without changing the Constitution.

SECTION XVII.

Chancellor Kent, in his Commentaries, vol. 1, p. 331 *et seq.* to 344, makes, I believe, as good and complete an argument as can be made upon that side of the question. He takes the reported opinions, admits the intricacies and difficulties which surround the position, assumes the decisions in *U. S.* v. *Hudson & Goodwin*, and *U. S.* v. *Coolidge*, to be the law; and attempts to justify it. In examing his argument, I believe that I shall answer all that counsel can say, or the court suggest, against my position.

The authority first cited is, *U. S.* v. *Worrall*, 2 Dallas 384 (Penn. Circuit), of which he says (p. 333): "This case "settled nothing, as the court were divided."

The next authority, *United States* v. *Burr*, (Va. Circuit), is little more satisfactory to that side of the question; for, while it ignores the constitutional question, and proceeds only under the statutory delegation, "it admits that, "when the Judiciary Act (S. 14) authorized the courts to "issue writs, not specially provided for by statute, but "which were agreeable *to the principles and usages of law*, "it referred to that generally recognized and long estab- "lished law, which formed the substratum of the laws of "every State."

Thus being, in fact, an authority for us, that Congress expressly recognized that the common law was the general, all prevading law of the land, not disparaged or in any respect denied by the Constitution.

The third case cited, is that of *U.* S. v. *Hudson & Goodwin;* which was not argued, was apparently but slightly examined, and was decided by a mere majority vote.

The fourth case, is that of *U. S.* v. *Coolidge*, (Mass. Circuit), 1 Gallison, 488, in which Judge Story, with less extended discussion than is usual for him, delivered an opinion of rare power, directly adverse to the preceding case, which opinion it is not necessary here to repeat, though the whole might well be here inserted as an argument. In this case the Judges were not divided, except in form, and to send the question again to the Supreme Court.

When this case reached the appellate court, it was not argued. Justice Story said that he did not understand that the case of Hudson & Goodwin had settled anything, —a position which was supported by Justice Washington, when he says, that, whenever the question shall be argued, he will divest himself of all prejudice occasioned by the former decision; and by Justice Livingston, who favored an argument.

This evident desire for an argument could not have existed, had the court been satisfied that the question had been fairly examined; and the only thing made clear by this case is, that the question was entirely unsettled. The case went upon a majority vote and the opinion was delivered by Justice Johnson, with an acumen and depth of reason, which compares unfavorably with the penetration and depth of a heavy dew. I speak this with all respect for the Court, and impressed with the evident lack of impression, created on the minds of other Justices, by his reasons assigned in the case of Hudson & Goodwin.

To this point, then, nothing had been decided; and our author (p. 338) was compelled to acknowledge, "that these "jarring opinions and decisions had not settled the general "question, as to the application and influence of the com-"mon law, upon clear and definite principles."

Our author (p. 339) then proceeds: "Mr. Du Ponceau, "in his dissertation on the nature and extent of the juris- "diction of the Courts of the United States, has ably ex- "amined the subject and shed strong light on this intricate "and perplexed branch of the national jurisprudence. He "pursues the distinction, and maintains that we have not, "under our federal government, any common law, con- "sidered as *a source of jurisdiction;* while on the other "hand, the common law, considered merely as the *means* "*or instrument* of exercising the jurisdiction conferred by "the Constitution and laws of the Union, does exist, and "forms a safe and beneficial system of national jurispru- "dence. The courts cannot derive their right to act, from "the common law. They must look for that right to the "Constitution and law of the United States. But, when "the general jurisdiction and authority is given, as in "cases of admirality and maritime jurisdiction, the *rules of* "*action*, under that jurisdiction, if not prescribed by "statute, may and must be taken from the common law, "if they are applicable, because they are necessary to give "effect to the jurisdiction."

Upon page 340, the author comments on the cases of Worrall and Hudson & Goodwin: "If such acts amount "to an offence against the United States, they must, of "course, be cognizable under its authority, and to the "jurisdiction of the Circuit Courts;" and proceeds (p. 341): "The Supreme Court of the United States, in *Robinson* v. "*Campbell* (3 Wheat., 212), went far towards the admis- "sion of the existence and application of the common law "to civil cases in the federal courts." And, after reciting the statute provisions, proceeds (p. 342): "Under these "provisions the court declared, that the remedies in the

" federal courts, at common law and in equity, were to be,
" not according to the practice of State courts, but ' accord-
" 'ing to the principles of common law and equity, as dis-
" 'tinguished and defined in that country, from which we
" 'derive our knowledge of those principles.'

" In this view of the subject, the common law may be cul-
" tivated as part of the jurisprudence of the United States.
" In its improved condition in England, and especially in
" its improved and varied condition in this country, under
" the benign influence of an expanded commerce, of en-
" lightened justice, of republican principles, and of sound
" philosophy, the common law has become a code of ma-
" tured ethics and enlarged civil wisdom, admirably adapt-
" ed to promote and secure the freedom, and happiness of
" social life.

" It has proved to be a system, replete with vigorous and
" healthy principles, eminently conducive to the growth
" of civil liberty; and it is, in no instance, disgraced by
" such a slavish political maxim as that, with which the
" Institutes of Justinian are introduced: *Quod principi*
" *placuit, legis habet vigorem.*" Inst. 1, 2, 6. It is the
" common jurisprudence of the United States, and was
" brought with them as colonists from England, and es-
" tablished here, *so far* as it was adapted to our institu-
" tions and circumstances. It was claimed by the Con-
" gress of the United Colonies, in 1774, as a branch of
" those ' indubitable rights and liberties, to which the res-
" 'pective colonies are entitled.' It fills up every inter-
" stice, and occupies a very wide space which the statute
" law cannot occupy. Its principles may be compared to
" the influence of the liberal arts and sciences. To use
" the words of the learned jurist, to whom I have already
" alluded, ' we live in the midst of the common law, we
" 'inhale it at every breath, imbibe it at every pore; we

" 'meet with it when we wake and when we lay down to
" 'sleep, when we travel and when we stay at home; and
" 'it is interwoven with the very idiom that we speak;
" 'and we cannot learn another system of laws without
" 'learning at the same time, another language.' "

SECTION XVIII.

In view of this quotation, the reason why Chancellor Kent regarded the question as "intricate and perplexed," is evident. He had assumed the opinion of Judge Johnson, in *U. S.* v. *Hudson & Goodwin*, to be the law, and is perplexed at the effect, a casual application of well known and well established principles, had upon the position taken.

Had he continued them to their logical result, all perplexity would have been removed, all intricacy would have vanished, and he would have seen that Du Ponceau's light, was only darkness.

This common law, claimed by the colonists as a part of those indubitable rights and liberties to which they were respectively entitled, which permeates and penetrates our every act, and surrounds us,—filling up every interstice,—which forms the substratum of the laws of every State,—forms the rules of action, if not prescribed by statute, under which the courts may, and must act, because these rules of action are necessary to give effect to the jurisdiction: Now, if the rule of action was prescribed by statute, it would, beyond question, be a law. Is it any less a law, because prescribed by another power? In both cases the courts declare what is the law, and enforce action in accordance with the rules so laid down by them.

It is necessary to give effect to their jurisdiction; that is, without it, they have no power to act; but by its aid they can act; and yet, he says it gives them no power to act.

From whence, then, do the Courts of Admiralty derive their power to act? The statutes creating them and, as this author assumes, giving them jurisdiction, give them no power to act; they cannot create a law, for that would be legislation. The legislature must either furnish the statutes, to give effect to their jurisdiction, or they must find other rules of action which they (not enacting) can declare to be the law, or they cannot act;—and this the Courts of Admiralty have done.—From whence comes the power, then, to act, to declare and enforce the common law? Not from statute; for, the statute is silent.

Where can "all" cases of law and equity be tried, but in the Courts of law, and Courts of Equity?

And where can suits at common law be tried by jury, except in Common law Courts?

And how can a fact be tried by jury, in the inferior Court, and re-examined in the Supreme Court, according to the rules of the Common law, if no such rules exist?

The Supreme Court has power to review all decisions of inferior courts, according to the rules of the common law, in all cases where no exceptions are made by Congress. The common law, then, is admitted to be the law, to some extent, dehors the statute, and to furnish the rules, by which the court shall proceed in all cases where the statute does not derogate from its power; and this, though the particular State, in which it is exercised, may never have admitted its force,—as in the States, where no Courts of Equity have ever been established.

This law is, by reference, in the Constitution confirmed; by it courts act; without it, or a substitute, they cannot act.

SECTION XIX.

How far does its power extend?

If a citizen of one State commits a wrong against a citizen of another State, or does any act whereby a cause of action at common law accrues, or if a vessel collides, or runs in debt, or becomes chargeable at common law,—suit may be brought; but what statute gives the courts jurisdiction of the cause of action,—or the right to examine into them, and say that the ship shall be charged, or, the defendant shall pay damages?

The statute says, they may issue all writs, necessary to their jurisdiction, and which are agreeable to the usages of law; but, what gives them jurisdiction of actions in case, or trespass, or assumpsit, or of libels?

The Constitution gives jurisdiction of parties but unless they get jurisdiction of the subject matter, from the common law, in all cases where the statute is silent,—I am at a loss to find its source, unless the jurisdiction of all cases of violation of right is inherent in the courts and exists in them, because they are courts, as a necessary constituent of their existence.

Whichever position is taken, the question is relieved of one of its most perplexing conditions, viz: that courts, deriving their only power and only jurisdiction from statutes, yet act on statutes, so imperfect, that the courts are compelled to add to them, words, which are not in them, to give them effect.

SECTION XX.

If we go one step farther, the system becomes harmonious: the two positions unite into one, and all perplexities and intricacies vanish; viz:

The common law, was, as affirmed by the congress of of the colonies in 1774, to be, a branch of those indubitable rights and liberties to which they were entitled; by it,—as containing the substratum of law, the permeating, penetrating, unalterable, and indubitable principles of justice and civil liberty—every man may claim, in courts of justice, of the judicial power a remedy for every violation of his rights;—this is of the very essence of civil liberty; therefore, if a man is deprived of his right to redress, he is deprived of civil liberty. Courts exist and act, within the boundaries of the English language, not to enforce the dictatorial and arbitrary commands of any power, because "*quod principi placuit, legis habet vigorem,*" but because, by the common law, as a necessary element of liberty, it is declared that, in courts of justice, for every right there shall be a remedy, and for every injury its proper redress, —an element existing before Magna Charta, affirmed by it, and so penetrating our system of jurisprudence and our very language, that we could not remove it from our system, without at the same time wiping out our language itself.

This common law (as has been well said) adapts itself to all circumstances, all states, and all times; by *its* principles all statutes must be construed; upon them all courts must act. Whatever be the form of the action, whatever the outward channels which legislatures may provide, the

substratum and foundation principles which require legislation itself, and control its construction, are found in it. It would, then, appear that the original source and fountain of the power of courts to act, is in this common law of justice; and the common law gives it to them, because they are tribunals for the administration of justice distributive, or, in common phrase, because they are courts of justice.

SECTION XXI.

Proceeding another step, we find that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

The division of government into departments was well understood,—their respective provinces were clearly defined: The legislative department could do what no other department could, namely, enact laws; but it could not adopt judicial functions, without going beyond legislation; and declaring the construction of laws, and applying them to particular cases, had long been committed to a separate department. Separate from either of the others, the executive department executed the laws, treaties and obligations of the nation. And the three departments—which were not as distinct in Britain as in the several States, where the line was generally drawn with great precision—made up a complete government. These were the departments of government.

These departments were again subdivided: the judicial into the grand subdivisions of law, equity and admiralty, each a department of the judicial department; the legislature into two houses of parliament, one of which only could originate a revenue law; the executive into the departments of state, war, finance, home, &c., each of which had its head, who was a minister, or servant to the chief executive.

SECTION XXII.

The meaning appears clear, when, in Art. 2, Sec. 2, (1), the President is authorized to require the opinion of the principal officer in each of the executive departments. And from the context of the next clause, it would not seem a forced construction to say, that the words "heads "of departments," as there mentioned, were intended to include the heads of the executive departments, which the preceding clause had treated as necessary ministers to the executive department of the government.

The provision of Art. 1, Sec. 8, (18), has nothing in its context to limit it to executive departments, but, in terms, refers to the combined whole: the Government of the United States, and the departments of that government.

The three divisions of the powers of government are clearly recognized by the three distinct articles. All legislative powers granted were vested in a department to be formed by election, and appointment of those who should exercise the power.

The executive powers were to be vested in another department, whose incumbent was not then elected. The judicial power of the United States was to be vested in another department.

Each department was a system, which, together, could execute all the powers committed to it. And the section before us treats those powers as vested in those departments, or systems, by the Constitution.

SECTION XXIII.

Had not the position been so many times slurred over, evaded and never fairly met, it would seem an indubitable proposition that—when the people said the judicial power of the United States shall be vested in a system or department, and treated the powers, granted by the Constitution, as vested powers,—that it conveyed to that department everything which could be included in the name.

Had Congress enacted a law like this: The highest court of judicature in the United States shall be called the Court of Ambassadors and for the correction of errors, and shall consist of nine judges, etc; and the inferior courts of the United States shall be called the courts of the people's bench, and shall consist of nine judges, etc.; all of which judges, and other officers, shall be appointed forthwith by the President, with the advice and consent of the senate, and shall immediately enter upon their respective offices; and such courts shall exercise the powers, and have the jurisdiction, vested in them by the Constitution, and no others,—would it for a moment have been doubted that the inferior courts took their power directly from a constitutional grant?

SECTION XXIV.

Inspection of the original Constitution will show that all nouns were commenced with capital letters, as was the custom of the times; but the word "supreme" is not so commenced, while "court" is commenced with the capital. And again, "inferior" is written like "supreme," with a small letter; but "courts" is commenced with the capital. The care with which the instrument was prepared in every part, even to punctuation, makes the presumption very strong that the word supreme was writted as an adjective, meaning "*highest in authority;*" and this becomes more apparent by the illustration above; for *by whatever name Congress might have designated it, when it was constituted, it would, if highest in authority, have been held to be the appellate court, designated in the Constitution.*

Again: Inspection shows that the word "in" recurs before "inferior courts": The judicial power of the United States, shall be vested *in* one supreme Court, and *in* such inferior Courts. Where is there any distinction in the grants of judicial power, or any difference in the action of the Constitution toward them?

The judges of both are provided with the same security in office, and compensation; and, in the one highest Court, *and in* the inferior Courts, the judicial power of the United States,—extending to all cases in law and equity, arising as stated, and to all cases in admiralty, and to the parties named,—shall be vested. Jurisdiction of the parties and subject matter, appear by this to be granted.

SECTION XXV.

Again: It appears that the power, mentioned in the first three articles of the Constitution, was granted, subject to no conditions, and vested by virtue of the grant, or else, the grant was utterly inoperative.

This word "vest"—: "to give an immediate fixed right "of present or future enjoyment"—, thrice used in the Constitution, has a peculiar significance.

The highest Court, and the inferior Courts, were all left to Congress to constitute, ordain, and establish; and when the Supreme Court and Circuit and District Courts were constituted, they existed as one highest and many inferior courts. Then, the grant took effect, the judicial power was vested, an immediate fixed right to present or future enjoyment of the judicial power of the United States, accrued to the highest and inferior courts.

The appellate jurisdiction, subject to exceptions by Congress, accrued to the highest court, and the original jurisdiction, subject to no exception, accrued to the inferior courts.

This instrument, being beneficial and conducive to liberty, shall be most liberally construed; and the whole judicial power must be intended. Yet, the whole cannot vest in the highest and in the inferior courts, where original jurisdiction is expressly excepted from the highest,—unless there is the same grant of original jurisdiction to the inferior, that there is of appellate jurisdiction to the highest court. Nor can the Constitution operate to convey the judicial power, the legislative or executive powers, unless the first President, upon election and qualification,—the first Congress, upon election and appointment,—the first Courts, upon constitution and establishment, had an immediate and fixed right of present enjoyment of the executive, legislative and judicial powers, respectively.

SECTION XXVI.

The manner, in which the remarks of the court, in *Wheaton et al.* v. *Peters et al.* 8 Peters, 591, have been presented in the digests, and in the note to Kent's Commentaries, above considered, requires a passing examination:

The case was one of copy-right; and on page 654, the court says: "The complainants assert their rights on two grounds:

"First, under the common law;

"Secondly, under the Acts of Congress."

Upon the first point cases are carefully examined, and the court sums them up (p. 657) in this manner:

"From the above authorities and others, which might "be referred to, if time permitted, the law appears to be "well settled in England, that, since the statute of 8th "Anne, the literary property of an Author, in his works, "can only be asserted under the statute; and that—not-"withstanding the opinion of a majority of the judges, in "the great case of *Miller* v. *Taylor*, was in favor of the "common law right before the statute,—it is still consid-"ered in England as a question, by no means free from "doubt."

The opinion then proceeds to show that, in justice and right, as a matter of common law, the author, after he had published his work to the world, has no common law property in it: and proves the position, by comparing the case with that of the inventor, who makes and vends a useful machine. "Does the common law give a perpetual

" right to the author, and withhold it from the inventor?
" And yet, it has never been pretended, that the latter
" could hold, by the common law, any property in his in-
" vention, after he had sold it publicly."

The opinion then proceeds, as follows (p. 658): " That
" every man is entitled to the fruits of his own labor, must
" be admitted; but he can enjoy them only (except by
" statutory provision) under the rules of property which
" regulate society, and which define the rights of things
" in general.

" But, if the common law right of authors were shown
" to exist in England, does the same right exist, and to the
" same extent, in this country?

" It is clear, there can be no common law of the United
" States. The federal government is composed of twenty-
" four sovereign and independent States, each of which
" may have its local usages, customs and common law.
" There is no principle, which pervades the union, and has
" the authority of law, that is not embodied in the con-
" stitution, or laws of the union. The common law could
" be made a part of our federal system, only by legislative
" adoption.

" When, therefore, a common law right is asserted, we
" must look to the State in which the controversy origina-
" ted. And, in the case under consideration, as the copy-
" right was entered in the clerk's office of the District
" Court of Pennsylvania, for the first volume of the book
" in controversy, and it was published in that State; we
" may inquire, whether the common law, as to copyrights,
" if any existed, was adopted in Pennsylvania.

" It is insisted, that our ancestors, when they migrated
" to this country, brought with them the English common
" law, as part of their heritage.

"That this was the case, to a limited extent, is admitted. "None will contend, that the common law, as it existed "in England, has ever been in force, in all its provisions, "in any State of this Union. It was adopted, so far only "as its principles were suited to the condition of the colo- "nies; and from this circumstance we see, what is com- "mon law in one State, is not so considered in another. "The judicial decisions, the usages and customs of the "respective States, must determine, how far the common "law has been introduced and sanctioned in each."

It is then shown that a common law copy-right did not exist in Pennsylvania, and it proceeds, page 660: "but there is another view, still more conclusive."

And this was on the constitutional provision and statutes under it; by which it appears, that, when it was proposed to secure, for a limited time, the exclusive right,—the common law perpetual right, if any existed, was ignored by the people. And the Acts of Congress under the Constitution, "instead of sanctioning an existing right, created it." And so much of the case as it is necessary here to consider, concludes (p. 663): "This right, as has been "shown, does not exist at common law;—it originated, if "at all, under the Acts of Congress."

As some of the sentences, above quoted, appear in the digests, and in the reporter's notes at the head of the case, isolated from all facts, they seem as the enunciation of a weighty principle, pregnant with meaning; for instance, this remark: "It is clear there can be no common law of the United States." Yet, just before this, we find allusion to the common law, in this sentence: "That every "man is entitled to the fruits of his own labor, must be "admitted; but he can enjoy them only (except by statu- "tory provision) under the rules of property which regu-

"late society, and which define the rights of things in "general.,,

The remarks are all correct enough, in connection with questionable property. In one State the author might have had complete protection from the courts, on the basis that he had a complete property in his works, while another might have refused it altogether, and decided that he had no property in it. Men were bought and sold in Carolina, while, voluntarily taking them into New York, made them free.

Things, benificent and valuable in one climate, are in another noxious. But this illustration develops the principle, and shows that those who took the remark of the court as an isolated or abstract statement, that there could be no common law, mistook its meaning.

Articles of food and value become noxious from change in surrounding circumstances.

Physicians, who have been among great epidemics, give accounts of many things, which have been valuable, becoming the agents for the spread of the malady, and divested of all value, and their destruction absolutely neces sary, and again being restored to harmlessness and value, —and all this, without any change, whatever, in the article itself.

Upon this we might say that there can be no common law of any State.

The intention of the court is made clear by the context, and the expression means that, as to questionable property, there can be no law common to all the States; each State may have its local usages, customs and common law.

And the court affirms our assertion that the rules of property which regulate society, and define the rights of

things in general, exist as principles, which prevade the Union with the authority of law; are embodied in and form the foundation of the Constitution, expressly recognized by the provisions, that no man shall be deprived of life, liberty or property, but by the judgment of his peers or the law of the land; and, the enumeration of certain rights, shall not be construed to deny or disparage others, retained by the people.

If the abstract statement is true, that there is no common law of the United States, because the States, each, have their local usages, customs and common law; it is also true that there was no common law of England, when Blackstone wrote, because England was made up of municipal corporations, counties, and other divisions, each of which had their local usages, customs and common law. Rigid uniformity of rules never was a characteristic of the common law as to matters which could be the subject of local law, or custom; but its fundamental principles, which regulate society and define the rights of things in general, governed throughout the whole domain of the common law; enforced the rights, acquired by every local usage or custom; protected life, liberty and property; gave a remedy for every violation of right,—and, even as to customs themselves, declared, in more than one case, that no usage, however ancient, could justify a custom, bad in itself.

Money v. *Leach*, 3 Burrows, 1743.

The common law is not a code of arbitrary enactments, but consists of principles of justice, which are illustrated, and ascertained in their application to myriads of individual cases, by courts of justice, and which are, as we have seen, ample to adapt themselves to, and protect persons and property, among the diverse local usages and customs of England, and form the substratum and foundation of our Constitution itself.

SECTION XXVII.

In all cases, where there is a legal right to justice, but for which right the law has not provided any specific legal remedy, a remedy is dispensed by the judicial power of the State, either by mandate, commanding, or injunction, forbidding.

Tapping on Mandamus, (Marginal p. 3.)
Rex v. *Dublin*, 8 Mod., 29.

"It seems unquestionable that a right of action for "damages generally exists against public officers, who re- "fuse or neglect to perform their duty, in favor of those "persons whose rights are injuriously affected by such "neglect of duty. *But this remedy by action against "the officers, is of such doubtful and uncertain character*, as "not to supersede that by mandamus. The unliquidated "damages, to be assessed by a jury, would not necessarily "be the amount due the party." (*The People* v. *Mead*, 24 N. Y., 120. *Ex parte Lynch*, 2 Hill, 45. *Strong, petitioner*, 20 Pick., 497.)

The court cannot shut its eyes to the fact that all this plaintiff could get, at the end of a suit for damages against the officers (who would be backed, in their entire suit, by the United States, which furnishes them counsel in this case), would be utterly inadequate to repair his damages; and, besides, they are alleged in the bill, to be insolvent.

SECTION XXVIII.

From the case of *Marbury* v. *Madison*, 1 Cranch, 137, we gather principles of law—decided by this court within 14 years after the enactment of the Constitution,—which are decisive, both as to the power of the Circuit Court to compel ministerial officers, by mandamus, and also as to the power of that court to restrain the officers from collecting the tax, wrongfully imposed. Read, in view of the object and design of the Constitution, to establish justice and secure liberty, the positions taken by the court, in that case, are impregnable. It says, upon the application for mandamus (p. 162): "This brings us to the second enquiry, which is: If plaintiff has a right, and that right "has been violated, do the laws of his country afford him "a remedy?"

(p. 163): "The very essence of civil liberty certainly "consists in the right of every individual to claim the pro- "tection of the laws, whenever he receives an injury. "One of the first duties of government is to afford that "protection." * * *

"In the third volume of his commentaries, *page* 23, "*Blackstone* states two cases in which a remedy is afforded "by mere operation of law. 'In all other cases,' he says, "'it is a general and indisputable rule, that where there is "'a legal right, there is also a legal remedy, by suit or ac- "'tion at law, whenever that right is invaded.'

"And afterwards, page 109 of the same volume, he says: "'I am next to consider such injuries as are cognizable "'by the courts of common law. And herein I shall, for

" 'the present, only remark, that all possible injuries, what-
" 'soever, that did not fall within the exclusive cognizance
" 'of either the ecclesiastical, military, or maritime tri-
" 'bunals, are, for that very reason, within the cognizance
" 'of the common law courts of justice (legal and equita-
" 'ble); for, it is a settled and invariable principle in the
" 'laws of England, that every right, when withheld, must
" 'have a remedy, and every injury its proper redress.'

" The Government of the United States has been em-
" phatically termed a government of laws, and not of
" men. It will certainly cease to deserve this high ap-
" pellation, if the laws furnish no remedy for the violation
" of a vested legal right.

" If this obloquy is to be cast on the jurisprudence of
" our country, it must arise from the peculiar circum-
" stances of the case.

" It behooves us, then, to enquire, whether there be, in
" its composition, any ingredient which shall exempt it
" from legal investigation, or exclude the injured party
" from redress." * *)p. 164): " Is it to be contended
" that the heads of departments are not amenable to the
" laws of their country?" * * * *

(p. 166): " The conclusion from our reasoning is that,
" where the heads of departments are the political or confi-
" dential agents of the executive, merely to execute the
" will of the President, or rather, to act in cases in which
" the executive possesses a constitutional or legal discre-
" tion,—nothing can be more perfectly clear, than that their
" acts are only politically examinable. But where a
" specific duty is assigned by law, and individual rights
" depend upon the performance of that duty, it seems
" equally clear that the individual, who considers himself

" injured, has a right to resort to the laws of his country " for a remedy." * * *

(p. 168): " It remains to be enquired, whether he is " entitled to the remedy for which he applies. This de- " pends on:

" (1.) The nature of the writ applied for, and

" (2.) The power of this court.

" 1. The nature of the writ:

" Blackstone, in the third volume of his commentaries, " page 110, defines a mandamus to be 'a command, issu- " 'ing in the king's name from the Court of King's Bench, " 'and directed to any person, corporation, or inferior " 'court of judicature, within the king's dominions, requir- " 'ing them to do some particular thing therein specified, " 'which appertains to their office or duty, and which the " 'Court of King's Bench has previously determined, or at " 'least supposes to be consonant to right and justice.'

" Lord MANSFIELD, in 3 *Burrows*, 1266, in the case of " *The King* v. *Baker et al*, states, with much precision and " explicitness, the cases in which this writ may be used. " 'Whenever,' says that very able judge, 'there is a right " 'to execute an office, perform a service, or exercise a " 'franchise (more especially if it be in a matter of public " 'concern, or attended with profit), and a person is kept out " 'of possession, or dispossessed of such right, and has no " 'other specific legal remedy, this court ought to assist by " 'mandamus, upon reasons of justice, as the writ ex- " 'presses, and upon reasons of public policy, to preserve " 'peace, order, and good government.' In the same case, " he says: 'This writ ought to be used upon all occa- " 'sions where the law has established no specific remedy,

" 'and where, in justice and good government, there ought
" 'to be one.' These circumstances, certainly, concur in
" this case."

In 1793, the Attorney General and Secretary of War, deemed a mandamus, directed to the head of a department, to be the most proper mode of trying a claim to a similar legal right, and (p. 172) " when the subject was
" brought before the court, the decision was not, that a
" mandamus would not lie to the head of a department,
" directing him to perform an act, enjoined by law, in the
" performance of which a person had a vested interest;
" but, that a mandamus ought not to issue in that case,—
" the decision, necessary to be made, if the applicant had
" not the legal right.

" The Judgment in that case is understood to have de-
" cided the merits of all claims of that description.

" The doctrine, therefore, now advanced, is by no means
" a novel one. It is true that the mandamus, now moved
" for, is not for the performance of an act, expressly en-
" joined by statute." * * *

" This, then, is a plain case of mandamus, either to de-
" liver the commission, or a copy of it from the record;
" and it only remains to be enquired, whether it can issue
" from this court.

" The Constitution vests the whole judicial power of the
" United States in one supreme Court, and such inferior
" Courts as Congress shall, from time to time, ordain and
" establish. This power is expressly extended to all cases,
" arising under the laws of the United States, *and conse-*
" *quently, in some form, may be exercised over the present*
" *case, because the right, claimed, is given by a law of the*
" *the United States.*

"In the *distribution of this power* it is declared that, "'the supreme Court shall have original jurisdiction in all "'cases affecting ambassadors, other public ministers and "'consuls, and those in which a State shall be a party. "'In all other cases, the Supreme Court shall have appel-"'late jurisdiction.'"

* * * (p. 175): "The plain import of the words "seems to be that, in one class of cases its jurisdiction is "original, and not appellate; in the other it is appellate, "and not original." * * "To enable this Court, then, "to issue a mandamus, it must be shown to be an exercise of "appellate jurisdiction, or to be necessary to enable it to "exercise appellate jurisdiction."

SECTION XXIX.

Had the Circuit Court the power to issue the writ?

The reply of *Marbury* v. *Madison*, is affirmative.

"*This power, in some form, may be exercised over the "present case, because the right, claimed, arises under the "law of the United States*;" and the right to a legal remedy, by suit or action at law, wherever a right is invaded, is reserved to the people, and not disparaged by the Constitution.

The whole judicial power of the United States is vested in the supreme Court, and in such inferior Courts as Congress has established.

In the distribution of power, this power is given to the courts of original jurisdiction. The supreme Court, in this instance, is not a court of original jurisdiction; the Circuit Court is.

The power exists, may be exercised, is vested somewhere. It is not vested in any but the Circuit Court; therefore it must exist in, and may be exercised by it.

SECTION XXX.

In the light of *Marbury* v. *Madison*, and tried by its principles, the case seems clear; but the case of *McIntire* v. *Wood*, 7 Cranch, 504, at page 506, overruled *Gilchrist* v. *The Collector of Charleston*, cited ante, and with the case of *McClung* v. *Silliman*, 6 Wheaton, 598, seems to place the power of the courts in the hands of Congress.

We will pass all cases where a mandamus to inferior Courts is granted or refused under particular statutes, and all which were based only on these two decisions; for, these being the foundation, all others must stand or fall with them.

It is to be noted that the closing language of the opinion in *McClung* v. *Silliman*, p. 605, and the decision of the case, is, "that all violations of private right, resulting from "the acts of such officers, should be the subject of actions "for damages, or to recover the specific property, in courts "of competent jurisdiction. That is, parties should be "referred to the ordinary mode of obtaining justice, in- "stead of resorting to the extraordinary and unprecedented "mode of trying such questions on a motion for a man "damus."

Both of these cases arose upon the same facts, and were the same case, presented in different forms. In *McIntire* v. *Wood*, the plaintiff had paid to the defendant, as receiver of the land office, the price of a piece of land, and demanded that he issue to him a final certificate of the purchase of the land; which the defendant refused, because, another had been issued to a different person, through

some mistake, growing out of the irregular form of the tracts along the river. And, in *McClung* v. *Silliman*, it appears that McIntire had assigned his receipts to McClung, a resident of another State, and that Silliman had become the receiver of the land office, as successor of Wood.

Upon this state of facts, it appears that the plaintiff had a full, perfect and adequate remedy at law for his injury. He was entitled, either to recover his money, with damages for its detention, or the value of the land at the time of his demand.

And in Chancery, the receiver could have been restrained, by injunction, from doing any act, which would prejudice the plaintiff's rights, and compelled, by decree, to do any act, yet remaining in his power, which the plaintiff might claim as a right. And these remedies would appear in every case, of the same sort, to be sufficient.

SECTION XXXI.

If this is true, then the question, upon which the Circuit Court were divided, viz.: "Whether that court had "power to issue a writ of mandamus to the register of the "land office in Ohio, commanding him to issue a final cer- "tificate of purchase to the plaintiff for certain lands in "that State"—was correctly decided in both cases: because a mandamus is not a proper remedy; and courts have not the power to grant it in cases, where a full and perfect remedy exists in the ordinary modes of administering justice, unless the statute has added it to the ordinary modes. In going any further than that, in either case, the court had to travel out of the record. The decision in the first case was: "that the Circuit Court did not possess the "power to issue the mandamus moved for" (6 Wheaton, 601); and the syllabus to the second case is (*id. p.* 598): "A State Court cannot issue a mandamus to an officer of the United States." And this is the only point which the court does not, in the opinion, profess to have decided in the former case.

SECTION XXXII.

But these two cases profess to go farther; and we will follow their language, and weigh it, almost by syllables; for it concerns a matter of grave import, on whose ultimate decision rests the very structure of our government, and the Constitutional guaranties of our liberties.

If the theory of these two opinions is correct, the judicial power of the United States is vested and rests in Congress, subject to its delegation and retraction.

If, on the other hand, the theory upon which much of our argument has been based, is true, the *whole judicial power* of the United States is vested in the courts,—*the great power*, which the King, as sovereign, exercised, sitting upon his bench in person, or, in judgment of law, being, in all his courts of justice, ever present and repeating the words of *Magna Charta*: "*Nulli vendemus*," &c.: We will neither sell, deny, nor delay justice to any man,—for every right there is a remedy. This was certainly a judicial power: It made no law, therefore it did not legislate; it simply decided what was the law before, what wrong existed in violation of that law, and adjudged and decreed a remedy for the wrong.

It cannot be contended that the people, as the sovereign and source of all power, successors to the King, as sovereign and source of all power, did not succeed to, and do not possess the power to grant, and not deny justice; they either possess it in their aggregate capacity as a nation's sovereign, or they have vested it somewhere.

If it is part of their judicial power, as it was of the King, they have vested it in the Courts of Justice.

If the Common law, and the right to protection and redress of wrongs, still exists in every citizen, undisparaged ; if the change of sovreigns has not taken away our right to the sovreign's protection, for which we joined society, and to which the Kings so fully and repeatedly pledged themselves in solemn compacts,—then their successors, the people, are in their courts of justice, ever present and repeating the words: "We will not sell, neither defer nor deny justice to any man,—for every wrong there shall be a remedy."

SECTION XXXIII.

By the Constitution, the judicial power of the United States is vested in one supreme Court, &c.

The judicial power extends to all cases in law and equity, arising under the Constitution and the laws of the United States;—in all cases affecting ambassadors and other public ministers and consuls, the supreme Court shall have original jurisdiction.

In suits at common law * * * the right of trial by jury, shall be preserved.

Appointment invests the appointee with the powers of an office, but it does not vest any power in the office itself.

Until the judges of the supreme Court were appointed, the powers of the court remained in abeyance, for want of an instrument to execute them. When the office was filled, and the instrument was provided for executing the powers, they became active; and, had Congress never passed a single statute relating to the practice, can it be doubted, that ambassadors, ministers and consuls, could have demanded a remedy for wrongs, and that the court could have adopted, from the common law, process and forms of proceeding, or even have framed original writs and remedies, necessary to the exercise of its jurisdiction?

SECTION XXXIV.

But what are "cases"? Are they not instances where it is alleged that the law has been transgressed, or right violated, and a remedy is prayed?

Irvine v. *Marshall*, 20 *How.*, 564.

And what is jurisdiction, but the right or power to say the law?

Our legal words were originally spoken in Latin; and often their clearest meaning is obtained by resolving them back into their original form:—juris–diction: speaking the law. Jurisdiction of these cases, then, involves the power to speak (1st) the right, (2d) whether it has been violated by the accused, defendant, or not, (3d) the remedy, and (4th) to make the remedy effectual.

The remedy and its effectuation is as much a part of the law, as the right.

Wayman v. *Southard*, 10 Wheat., p. 23.

Juris–diction, to the 4th division of its acts, is not necessarily judicial power; it only becomes power when it compels all things necessary to its perfect exercise and complete execution.

SECTION XXXV.

The relation of the legislature to judicial power, is illustrated by the appointment to judicial office.

The power exists outside and independent of legislative action. The legislature may, however, prescribe channels in which it shall run: forms, process, every exterior provision, provided they leave intact the power itself.

But, as the legislature cannot destroy the power, or any part of it, or suspend it, or take it away by direct action it follows that it cannot do it indirectly, by providing insufficient channels for its exercise. And the possessor of the judicial power of the United States, must have, inherent in the power itself, the means of constant, active existence, and complete juris–diction, either by the assistance of, or independent of, the legislature.—To be power, it must always be able to decide what is the law, what wrong exists in violation of that law, and to adjudge and decree a remedy for the wrong.

SECTION XXXVI.

In this view, the language of the opinion in *McIntire* v. *Wood*, is not diverse from our doctrine, *i. e.*: "We are of "the opinion, that the power of the Circuit Courts to issue "the writ of mandamus, is confined exclusively to those "cases in which it may be necessary to the exercise of "their jurisdiction."—If their judicial power of jurisdiction extends to deciding what is the law, what wrong exists in violation of that law, and to adjudging and decreeing a remedy for the wrong,—then they may issue this, or some parallel writ, as absolutely necessary to this juris-diction, in all cases where there is no other substantial and sufficient remedy.

SECTION XXXVII.

Beyond this we cannot go with this opinion; it proceeds: "But, although the judicial power of the United "States extends to cases arising under the laws of "the United States, the legislature have not thought "proper to delegate the exercise of that power to its Cir- "cuit Courts, except in certain specified cases."

"Its Circuit Courts"—Whose? If the inferior Courts belong to Congress, the Congress can abolish them, and the Constitution made a mistake in enacting that the Judges shall hold their offices during good behavior, and intended, notwithstanding the clear and careful wording of this Section, to say: "during the pleasure of Congress, or "while Congress shall continue their offices."

It is evident, however, from the whole Constitution, that, in its enactment, the people intended to institute a complete judicial system, adequate to all the wants of a growing nation; but no more intended to give to Congress the power to abolish it, than to abolish the Executive department.

SECTION XXXVIII.

The judicial power of the United States existed before the number of the Judges of the Supreme Court was established, or even the Court was created, or the inferior Courts, the channels for its exercise, were ordained.—The power itself existed, and was an office;—Congress created, appointed and ordained a corporation to receive the vesture and powers of the office, and the President appoints and commissions a man, investing him, in turn, with the power.—After Congress ordains and establishes a Court, it exists, in abeyance, though no Judge or instrument is provided to invest himself in it and execute its powers;—and so the judicial powers were ready to invest the Courts, when Courts should be provided to don the vestments.

If, in such provision, Congress delegated "their" judicial power to the Courts, then the President delegates his judicial power to the Judges when he commissions them.

The Constitution (Art. 1, S. 8, 18,) treats the powers as "vested by this Constitution," not only in the Government of the United States, but also proceeds: "*or any department or officer thereof.*" The Senate and House of Representatives are treated in the aggregate, only. No officers, save the President, and "the Judges of *both the supreme* "*and inferior* Courts" (Art. 3, S. 1.) are mentioned in the Constitution as such; and, as to the Judges, it it provided, that they shall hold their offices during good behavior, and shall receive, at stated times, the compensation undiminished.

It is a necessary sequence that it was the intent of the makers of the Constitution, to vest, *by its grant*, in the

President and in the judicial officers, the powers of their several offices whenever they should be designated or appointed by the person, or department, to whom the power of appointment was given; and did not, in conferring the power of creation or ordination, confer any power over the appointee by implication.—The authority to distribute judicial powers must be sought, and can only be found in the clause, authorizing all laws necessary and proper to carry the powers vested, into effect.

SECTION XXXIX.

Returning to the text of the opinion, we find the whole decision stated again in *McClung* v. *Silliman*, 6 Wheat., p. 600: "Though this power would follow from vesting in "its courts the whole judicial power of the United States, "the argument fails here, since the legislature has only "made a partial delegation of its judicial powers to the "Circuit Court;"—and p. 604: "But when, in the cases "of *Marbury* v. *Madison*, and that of *McIntire* v. *Wood*, "this Court decided against the exercise of that power, "the idea never presented itself to any one, that it was "not within the scope of the judicial powers of the United "States."

The opinions speak of the legislature and "its courts," and "its judicial powers."

Upon the question in Hayburn's case, it was decided that, all legislative powers of the United States were not granted to Congress, that the people exercised a large part of them, and reserved that portion to themselves; therefore, the people, in enacting that fundamental law, were a legislature; and if they did not delegate or grant their judicial power to the Courts or to Congress, then none of them can be exercised or granted by either.

SECTION XL.

We look in vain for any grant of judicial power to Congress, or any authority to grant; for, *a power to appoint is not a power to convey.*

A, conveys or devises property to such person as B shall by deed appoint, and B names C, and executes the deed of appointment; B conveys nothing, but C is invested with the title by the conveyance or devise of A.

We find: "The Congress shall have power to con-"stitute tribunals inferior to the supreme Court," and: "The judicial power of the United States shall be vested "in one supreme Court and in such inferior courts as "the Congress may, from time to time, ordain and es-"tablish."

This is very like a deed or devise to one whom another shall appoint.—Congress may constitute, and shall ordain and establish.

Constitute: To give formal existence to.

Ordain: To establish in a particular office or order."

Establish: To set and fix firmly or unalterably; to form permanently.

Congress, then, had power to give formal existence to the circuit Courts, to establish them in the office and as the instruments of judicial power, and set and fix them unalterably therein.

If the grant of the people could operate directly to convey the judicial power to inferior tribunals, to which Congress might give formal existence, then it was not necessary, to carry this constitution or appointment of the inferior tribunal into effect, that Congress should grant any such power to them, and, not being necessary, Congress has not the power to do it.

SECTION XLI.

It was evidently the intention of the people to leave to Congress the number of Judges of the supreme Court, so that a sufficient number might always be provided, and to leave also the territorial jurisdiction of inferior courts, the establishment of courts of record, and courts inferior to courts of record, for examinations and minor causes; but themselves granted directly to any and all such, the judicial powers of the United States, in order to establish justice, that is, to fix it, firmly and unalterably, and to secure liberty.

SECTION XLII.

"The very essence of civil liberty certainly consists in "the right of every individual to claim the protection of "the laws, whenever he receives an injury." (*Marbury* v. *Madison*, 1 Cr., 163.) Is the obloquy to be cast on the Constitution, which was enacted to secure liberty, that the laws it established, furnish no remedy for the violation of a vested legal right? If it is true, then the Constitution did not establish justice; and the attempt was a hideous abortion, a complete failure; the essence of civil liberty does not permeate the system it inaugurated, and all that we may say of our birth-right in the land of the free,—our inheritance from the mother country, baptized and purified in blood, and preserved and held aloft as the beacon light to a dark and down-trodden world,—all that we may have claimed, of justice established and liberty secured,—are false, glittering generalities, which will not bear the test of particular application: We have the form without the substance, the name, without the spirit essential to give it worth or meaning.

SECTION XLIII.

The object of the Act, is a proper criterion to judge of its intention, if the words are at all ambiguous.

Which would secure liberty and establish justice most certainly?—to place its very essence unalterably in the keeping of the department, which was called into being for the purpose of exercising its powers,—or to place it in the hands of a department, which must, from the very necessities of its position, be cut off from the examination or knowledge of individual cases of wrong, to be doled out or withdrawn by that department as it may deem expedient?

SECTION XLIV.

This brings us to the distinction between the powers of the two departments: Legislation must settle questions of expediency, and act in relation to them;—but Justice can know no expediency; it can, as each case presents itself, only decide what is the law, which is, as Lord Coke has it, "the true and right line, wherein all justice distributive is guided," and in that right line must enforce the remedy in each individual case, wherever there is a right.

SECTION XLV.

We now return to the original law laid down in *Marbury* v. *Madison*, and find the principle again repeated in *Kendall* v. *the United States*, 12 Peters, 524, at page 624: "The power to enforce the performance of the act must "rest somewhere, or it will present a case, which has often "been said to involve a monstrous absurdity, in a well "organized government,—that there should be no remedy, "although a clear and undeniable right should be shown "to exist."—It may be shown that an argument from absurdity, is precisely that, attempted to sustain the opinion in *McClung* v. *Silliman*, 6 Wheat. 603; and we may use the argument against the power of that case, freely, because, adopting it, the Court then admitted the soundness of its foundation as used in the other cases.

The decision in *Marbury* v. *Madison*, is, that there was nothing in the case to exempt the question from legal examination or exclude the injured party from legal redress, —and (page 173): "This, then, is a plain case for a man- "damus," * * * "and it only remains to be enquired, "whether it can issue from *this* court. The Constitution "vests the *whole* judicial power of the United States in "one supreme Court, *and* such inferior Courts as Con- "gress may, from time to time, ordain and establish."

Compare with this language, the opinion in *McClung* v. *Silliman*, 6 Wheat., at p. 600: "Though the power would "follow from vesting in its courts *the whole* judicial power "of the United States, the argument fails here, since the "legislature has only made a partial delegation of its ju-

" dicial powers to Circuit Courts." And we find that the two cases are totally inconsistent.

Marbury v. *Madison* holds that the Constitution vests the *whole* judicial power of the United States, in one supreme Court and in the inferior Courts,—that the Constitution forbade the Supreme Court to exercise original jurisdiction in such cases, and vested it in the inferior Courts.

McClung v. *Silliman*, and *McIntire* v. *Wood*, hold that the Constitution does not vest the judicial power of the United States in one supreme Court and in the inferior Courts,—but, that both obtain their judicial power in all cases, not affecting ambassadors, other public ministers and consuls, from the grant of Congress, and have no power except that which Congress has granted and may retract. The Supreme Court cannot re-examine anything, which has not come within the cognizance of the inferior Courts; therefore, judicial power over all cases, except those of ministers and States, is completely at its mercy.

SECTION XLVI.

One case says, the courts have received the whole power; the other opinion says, they have not. Which is the law?

Is it the "monstrous absurdity," that in this so-called free government, there is no remedy, although a clear and undeniable right is shown to exist?

Was Britain more free under the Magna Charta and compact with her King, in the twelfth century, than the United States under her Constitution?

Was justice better established and liberty more secure in England, when Blackstone wrote:—"It is a general "and indisputable rule, that where there is a legal right, "there is also a legal remedy by suit or action at law, "whenever that right is invaded," * * * "for it is a "settled and invariable principle in the laws of England, "that every right must have a remedy, and every injury "its proper redress by suit or action at law,"—than in America to-day?

Or were the courts of justice invested by the Constitution with the whole judicial power of the United States, and so empowered that every individual can have a legal remedy therein for every legal right?

SECTION XLVII.

Article 1 of the Constitution provides that "all legisla- "tive powers, herein granted, shall be vested in a Congress "of the United States, which shall consist of a Senate and "House of Representatives. The House of Representa- "tives shall be composed of members, chosen every second "year, by the people of the several States.

"The Senate shall be composed of two Senators from "each State, to be chosen by the legislature thereof."

There was no Congress till the members were chosen. The people of the several States could not severally delegate to their representatives, the power to rule the whole people; nor could the legislature of the several States, severally, delegate any power to control the Nation.

"The legislative powers" herein granted' "were granted to, and, when Congress came into existence, vested in Congress by direct action of the Constitution. It is the grant of the whole people to the appointees of the several divisions.

Again:

The Executive power shall be vested in a President, to be chosen by electors, appointed by the several States, except that, in a certain contingency, the choice shall be made by the House of Representatives. The grant of Executive power is direct to the person appointed by electors, or, in default of such appointment, to the person appointed by another.

In case of removal, &c., of the President, the powers

shall devolve on the Vice President, and Congress may designate the officer who shall act, in case both are disabled. Till the disability of the President, neither of these other officers would have any power; therefore it is plain, that neither the Electors, nor Congress, granted any power to them; but when the contingency happens which makes the individual, President, he is invested with the Executive power, by virtue of the Constitution.

Again: The Judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts, as Congress may, from time to time, ordain and establish. Again: A grant of power was made to a department not in existence; but, when called into existence, the power vested by virtue of this grant. If the several Electors could abridge the powers of Congress or of the President, by conditions annexed to their ballots, then Congress could abridge the power of the courts by conditions annexed to their appointment.

SECTION XLVIII.

"It has been established, ever since the time of Lord "COKE, that where a power is executed, *the person taking* "*under it, takes under him who created the power, and not* "*under him who executes it.*"

Lord TENTERDEN, in *Doe ex dem.*, *Wigan* v. *Jones*, 10 B. and C., 459, p. 467. To the same effect are the cases of

Skeeles v. *Shearly*, 3 Mylne & Craig, 112,
and *Willard* v. *Nason*, 5 Mass. 240.

And going back to Littleton's Tenures, Sec. 169, we find the same doctrine in his quaint expression. Coke's Commentaries thereon, are as follows:

"For, albeit the executors in this case have no estate or "interest in the land, but only a bare and naked power, "yet, this feofment (by the executors) amounteth to an "alienation, to vest the land in the feoffee as it appeareth "here, *and the feoffee shall be in by the devisor.*"

"And therefore, if, by the custom, a man deviseth that "a reversion or any other thing that lyeth in grant, shall "be sold by the executors, they may sell the same with- "out deed, *for the vendee shall be in by the devisor, and not* "*by the executors*, as hath been said."

That this doctrine has been established ever since that early date, appears in the following succession of cases:

Lord Stafford's case, 8 Co. Rep., 77 a.
Cook v. *Duckenfield*, 2 Atk., 562, p. 565, 567 and 568.
Bradish v. *Gibbs*, 3 Johns. Ch., 555.
Thompson v. *Livingston*, 4 Sanf., 539.
Roach v. *Wadham*, 6 East., 289.

"*The title rests upon the act creating the power, and* "*takes effect as if created by the original deed.*" This is the statement in *Doolittle* v. *Lewis*, 7 Johns. Ch., 45, p. 48.

And the doctrine, as laid down in the cases cited, from Johnson's Chancery Reports, Sanford and Atkyns, is, that the conveyance by the original grantor or devisor, and the appointment under the power, are, though by different deeds at remote periods, to be considered as but one and the same act and conveyance of the original grantor:—Both deeds are to be considered together but one instrument.

It is true, that—as between individuals—as to matters relating merely to property, the law would not take hold of a grant, where either the person to appoint or the object to take the grant, was not *in esse*, and would declare the use void, destroying both the power and the grant; but, as to charities, and things denominated *beneficial*, the principle was well established, that the charity or benefits were to be considered *as the substance;* and it mattered not how uncertain the persons or objects may be, or whether the persons who are to take, are *in esse* or not, or whether the legatee be a corporation, capable in law of taking, or not, whether the bequest can be carried into exact execution, or not,—in all these, and the like cases, the legacy will be sustained, and effect given to it *according to its own principles.*

(For authorities see Appendix to 4th Wheaton's Reports, especially pp. 10, 11, 12.)

Thus we see that this grant and power could be carried into effect under known and recognized principles, being beneficial: The fundamental principle being, that the sub-

stance was to be preserved, and not sacrificed to the means, and the end attained, and, at all events.

The preservation of the object and design of the people, then, has caused the Constitution to overleap technical hindrances, and prevented the sacrifice of the end to the means; and the next step, upon the foregoing principles, finds the appointment of Congress and of the President, and the grant of power by the people to the Courts and Judges, —one and the same act of the people. And as the grantor does not limit the grant, and the substance and object of the grant is best subserved by making it complete, where is the authority to limit or divest the power granted?

The words "constitute" and "ordain" are, in the dictionaries, treated as almost synonyms of *appoint;* each is given as a definition of the other; yet both are used as implying more complete investment in a power or office, than appointment to it. And the word "establish" implies no power to render infirm, but only, to fix firmly and unalterably *in* the power.

"Create" is not used in the Constitution, in relation to the Courts, or any of them; and the doctine, that the Courts are, or can be, the *creatures* of the Legislature,—having no power or functions but those which it *creates*—can find no support either in the words, the substance, the object, or in any established rule of construction, as the enactment of the people.

SECTION XLIX.

Before proceeding to group the cases affecting, or supposed to affect this question, I will quote the language of *Irvine* v. *Marshall*, 20 How., p. 564, which seems to be an acknowledgment of the principles we have advocated. It is in these words:

" With regard to the fourth objection, of a want of juris-
" diction in the courts of the United States, in the absence
" of express statutory provisions, to recognize and enforce
" a resulting trust, like that presented by the present case,
" it is a sufficient response to say, that the jurisdiction of
" the courts of the United States is properly commensurate
" with every right and duty created, declared, or necessa-
" rily implied, by and under the Constitution and laws of
" the United States.

Those courts are created courts of common law and
" equity; and under whichever of these classes of juris-
" prudence such rights or duties may fall, or be appro-
" priately ranged, they are to be taken cognizance of and
" adjudicated according to the settled and known princi-
" ples of that division to which they belong.

" By the language of the Constitution it is expressly de-
" clared, (Art. 3d, sec. 2, clause 1,) that the judicial power
" of the United States shall extend to all cases in law and
" equity arising under the Constitution, the laws of the
" United States, and treaties made under their authority.
" By the statute which organized the judiciary of the Uni-
" ted States, it is provided, that the Circuit Courts shall
" have jurisdiction of suits of a civil nature " at common

" law or in equity." (Vide 1 Stat. at L., p. 78, section 11.)
" In the interpretation of these clauses of the Constitution
" and the statute, this court had repeatedly ruled, that by
" cases at common law are to be understood suits in which
" legal rights are to be ascertained and determined, in con-
" tradistinction to those where equitable rights, alone, are
" recognized, and equitable remedies are administered.
" (Vide *Parsons* v. *Bedford*, 3 Pet. 447, and *Robinson* v.
" *Campbell*, 3 Wheaton, 212.) That by cases in equity
" are to be understood suits in which relief is sought
" according to the principles and practice of the equity
" jurisdiction as established in English jurisprudence.
" Vide the case of *Robinson* v. *Campbell*, just cited,
" and the *United States* v. *Howland*, 4 Wheaton, 108.)

" Here, then, is an exposition both of the Constitu-
" tion and laws of the United States, with reference both
" to the jurisdiction and powers of their courts, and to the
" instances in which it is their duty to exercise those pow-
" ers; and the inquiry forces itself upon us, who shall or
" can have the authority to deprive them of those powers
" and that jurisdiction? or can those courts, consistently
" with their duty, refuse to exert those powers and that
" jurisdiction for the protection of rights arising under the
" Constitution and laws, in the acceptation in which both
" have been interpreted and sanctioned?"

SECTION L.

The Constitution vested in the supreme Court Original Jurisdiction in certain cases.

In 1793, in the case of *Chisholm* v. *Georgia*, 2 Dallas, 419, Mr. Randolph, the Attorney General of the United States, took, as the basis of his argument, this construction of the Constitution (p. 432): "That the moment the Su- "preme Court is formed, it is to exercise all the judicial "power, vested in it by the Constitution, by its own au- "thority, whether the legislature has prescribed methods "of doing so, or not." And Judge IREDELL, in his opinion, dissenting from the views of the court, says (p. 432): "My "conception of the Constitution is entirely different. I "conceive that all the courts of the United States must "receive, not merely their organization as to the number of "Judges, of which they are to consist, but all their author- "ity as to the manner of their proceeding, from the legis- "lature only." And again, (at p. 449) he recapitulates: "The Constitution, so far as it respects the judicial author- "ity, can only be carried into effect, by Acts of the legis- "lature, appointing courts and prescribing their methods "of proceeding."

The decisions of the court were delivered *seriatim:* Justice BLAIR says(page 450): "The Constitution of the "United States is the only fountain from which I shall draw, the only authority to which I shall appeal." * * (p. 451): "after describing, generally, the judicial powers "of the United States, the Constitution goes on to speak "of it distributively, and gives to the Supreme Court orig-

" inal jurisdiction, among other instances, in the case where " a State shall be a party."

WILSON, Justice, says (p. 461): " I am, thirdly and " chiefly, to examine the important question, now before " us, by the Constitution of the United States and the le- " gitimate result of that valuable instrument.

" Under this view, the question is naturally subdivided " in two others: (1.) *Could* the Constitution of the Uni- " ted States vest a jurisdiction over the State of Georgia?

" (2.) *Has* that Constitution vested such jurisdiction in this court?

" I have already remarked that, in the practice and " even in the *science* of politics, there has been frequently " a strong current against the *natural* order of things, and " an *inconsiderate* or an *interested* disposition to sacrifice " the *end* to the *means*. Even in almost every nation " which has been denominated *free*, the *State* has assumed " a supercilious prominence above the *People*, who have " *formed* it. In *despotic* governments, the *government* has " usurped, in a similar manner, both upon the *State* and " the *People*." * * * " In each, *Man* is degraded from " the *prime* rank which he ought to hold in human affairs; " in the latter, the State as well as the Man is degraded."

* * * (p. 463): " Our National scene opens with " the most magnificent object which the Nation could pre- " sent: 'THE PEOPLE of the *United States*' are the first " personages introduced. Who were those people? They " were the citizens of thirteen States, each of which had a " separate Constitution and Government, and all of which " were connected together by articles of confederation.

" To the purposes of public strength and felicity, that

" confederacy was totally inadequate. A requisition on " the several States terminated its *legislative* authority: " *Executive* or *judicial* authority, it had none. In order, " therefore, to form a more perfect union, to *establish jus-* " *tice*, to ensure domestic tranquility, to provide for com- " mon defence and to secure the blessings of liberty, *those* " *people* ordained and established the present Constitution.

" By that Constitution, legislative power is vested, " executive power is vested, *judicial* power is vested."

And the first question is answered, that the Constitution could vest a jurisdiction.

p. 464. " The next question is: Has the Constitution " done so?"

* * * " Ever since the time of *Bracton*, the maxim, " I believe, has been deemed a good one: '*Supervacuum* '" *esset leges condere, nisi esset qui leges tueretur.*' (Bracton, "107): 'It would be superfluous to make laws, unless " ' those laws, when made, were to be enforced.'

" When the laws are plain, and the application of them " is uncontroverted, they are enforced immediately by the " *Executive* Authority of the Government. When the " application of them is doubtful or intricate, the interpo- " sition of the *Judicial* Authority becomes necessary. " The same principle, therefore, which directed us from " the first to the second step, will direct us from the sec- " ond to the third and last step of our deduction. Fair " and conclusive deduction, then, evinces, that the *people* " of the United States did vest this Court with jur- " isdiction.

* * * (p. 465): " Whoever considers, in a com- " bined and comprehensive view, the general texture of " the Constitution, will be satisfied that the people of the

" United States intended to form themselves into a Nation " for *National* purposes. They instituted for such pur- " purposes, a National Government, *complete in all its* " *parts*, with powers executive, legislative and judiciary, " and in all those powers extending over the whole " nation."

CUSHING, Justice, (p. 466) found the warrant only in the Constitution (s. 2, art. 3): The judicial power shall extend to all cases, &c.

JAY, Chief Justice, having examined the manner in which the people, individually, and the States, as States were liable to need justice or to do injustice, and stated, what was clearly understood, that " from the crown " of Great Britain the sovreignty of their country " passed to the people of it,"—continues (p. 474):

" These were among the evils, against which it was " proper for the nation, that is, the people of all the " United States, to provide, by a national judiciary, to be " instituted by the whole nation, and to be responsible to " the whole nation.

" Let us now turn to the Constitution.

" The people therein declare that their design, in its es- " tablishment, comprehended six objects: 1st, To form a " more perfect union; 2d, To establish justice; 3d, To " ensure domestic tranquility; 4th, To provide for the " common defence; 5th, To promote the general welfare; " 6th, To secure the blessings of liberty to themselves " and their posterity. * * * * *

" It may be asked, what is the precise sense and latitude " in which the words, *to establish justice*, as here used, are " to be understood?

"The answer to this question, will result from the pro-
"visions made in the Constitution, on this head. They
"are specified in the second section of the third article,
"where it is ordained that the judicial power of the United
"States shall extend to ten descriptions of cases, viz:

"1st. To all cases arising under this Constitution; be-
"cause the meaning, construction and operation of a com-
"pact ought always to be ascertained by all the parties,
"or by authority, derived only from them.

"2d. To all cases arising under the laws of the United
"States; because, as such laws, constitutionally made, are
"obligatory on each State, the measure of obligation and
"obedience ought not to be decided and fixed by the party,
"from whom they are due, but by a tribunal, deriving
"authority from both the parties."

Having enumerated the ten divisions, the Chief Justice continues (p. 476): "Even this cursory view of the judicial "powers of the United States, leaves the mind strongly "impressed with the importance of them, to the preserva-"tion of the tranquility, the equal sovereignty and the "equal right of the people." * * * "The ordinary "rules of construction will easily decide whether these "words are to be understood in a limited sense. This ex-"tension of power is *remedial*." * * * "It is, there-"fore, to be construed liberally."

Upon this reasoning the Chief Justice founds his opinion, also.

And the whole Court—except Justice IREDELL, who dissented—, having laid down these principles, which must not only govern this, but all other cases in which they are involved, refused to sacrifice the *end* of the Constitution to the *means;*—refused to dissent, with Justice IREDELL, from

the position, that the Constitution had formed a government, complete in all its parts, with powers executive, legislative, and judicial, and in all those powers extending to the whole nation,—and—though Congress had provided no means, whatever—construed the direct constitutional grant of power most liberally, issued an original writ, prescribed an original manner of service, and assumed, to the full extent, the jurisdiction which had been denied.

This case, in addition to its judicial authority, has also the weight of contemporaneous construction: Decided within four years after the Constitution was enacted,—advocated by Randolph, and adjudged by Jay, Wilson, Cushing and Blair, two of whom (Wilson and Blair) were members of the Convention which framed that instrument, and all, among those who have ever been considered as its ablest expounders.

The authority of the principles, there laid down, so far as they establish that the power of the supreme Court is derived directly from the people, has never been denied by any adjudged case.

On the contrary, a number of cases, extending almost to the present time, have re-iterated the doctrine.

SECTION LI.

And, in 1838, in a case of the highest dignity, *The State of Rhode Island* v. *The State of Massachusetts* (12 Peters, 657) took occasion to re-iterate the principles, thus (p. 719): "Those States, in their highest sovereign capacity, "in the convention of the people thereof, on whom, by "the revolution, the prerogative of the Crown, and the "transcendent power of parliament devolved, in a pleni- "tude, unimpaired by any act, and controllable by no au- "thority, 6 Wheat., 651, 8 Wheat., 584, 88;—adopted the "Constitution, by which they, respectively, made to the "United States a grant of judicial power over two or more "States.

"By this grant, this Court has acquired jurisdiction over "the parties in this cause, by their own consent and dele- "gated authority,—as their agent for executing the judi- "cial power of the United States in the cases specified.

"Massachusetts has appeared, submitted to the process "in her legislative capacity, and plead in bar, to the plain- "tiff's action, certain matters, on which the judgment of "the court is is asked. All doubts as to jurisdiction over "the parties, are thus at rest, as well by the grant of power "by the people, as the submission of the legislature to the "process."

Note, that, as consent of parties cannot confer jurisdiction (*Montgomery* v. *Anderson*, 21, How., 386; *Ballance* v. *Forsythe*, 21. How., 389), the only real foundation for this decision must have been the grant of jurisdiction by the people; and is so stated,—(page 721): "Our next inquiry

" will be, whether we have jurisdiction of the subject mat-
" ters of the suit, to hear and determine them." * * *
" Though the Constitution does not in terms extend the
" judicial power to all controversies between two or more
" States, yet, it in terms excludes none, whatever may be
" their nature or subject. It is, therefore, a question of
" construction, whether the controversy in the present case,
" is within the grant of judicial power.

" The solution of this question must necessarily depend
" on the words of the Constitution; the meaning and in-
" tention of the Convention which framed and proposed it,
" for adoption and ratification, to the conventions of the
" people of and in the several States; together with a re-
" ference to such sources of judicial information, as are re-
" sorted to by all Courts in construing statutes, and to
" which this court has always resorted in construing the
" Constitution * * * * * * *
" (722): This court, in construing the Constitution as to the
" grant of powers to the United States * * *, has
" ever held that an exception of any particular case, pre-
" supposes that those which are not excepted, are em-
" braced within the grant or prohibition, and has laid it
" down as a general rule, that, where no exception is made
" in terms, none will be made by mere implication or con-
" struction. 6 Wheat., 378; 8 Wheat., 489, 490; 12
" Wheat., 438; 9 Wheat., 206, 207, 216 * *
" * * * (p 729): In front of the Constitution is a
" declaration by the Sovereign power from which it ema-
" nated,—that it was ordained in order to form a more per-
" fect union, establish justice, insure domestic tranquility,
" &c.

" Whether it was best calculated to effect these objects
" by making the judicial power utterly incompetent to ex-

" ercise a jurisdiction, * * * or, whether the powers, " granted to this court, by the People of all the States, " ought, by mere construction and implication, to be held " inefficient for the objects of its creation, and not capable " of 'establishing justice' * * * are the questions " before us for consideration." * * (p. 731): " When " the court judicially inspects the Articles of Confedera- " tion, the preamble to the Constitution, together with the " surrender, by the States, of all power to settle their con- " tested boundaries, with the express grant of original ju- " risdiction to this court,—we feel not only authorized, but " bound to declare, that it is capable of applying its judi- " cial power. * * *

" There is but one power, in this Union, paramount to " that by which, in our opinion, this jurisdiction has been " granted;—that power has been exerted in the 11th " Amendment."

It is clearly the settled law, that the Constitution gave, —and nothing, but a change in the Constitution can take away—the original jurisdiction and judicial power, vested in the Supreme Court.

SECTION LII.

The appellate powers of the Supreme Court are given by the Constitution and not by the statutes.

Durrousseau v. *U. S.*, 6 Cranch, 313, (cited ante).

Marbury v. *Madison*, 1 Cranch, 154.

Wilson v. *Mason*, 1 Cranch, 91, 92.

1796. "The Constitution, distributing the judicial "power of the *United States*, vests in the Supreme Court "an original as well as an appellate jurisdiction. The orig- "inal jurisdiction, however, is confined to cases affecting "ambassadors, other public ministers and consuls, and "those in which a State shall be a party. In all other "cases only an appellate jurisdiction is given to the court; "and even the appellate jurisdiction is, likewise, qualified, "inasmuch as it is given with such exceptions and under "such regulations as the Congress shall make."

Wiscart v. *D'Auchy*, 3 Dall., 327.

The manner in which these exceptions and regulations were originally made, is stated in

Durrousseau v. *U. S.*, 6 Cranch, p. 314.

by MARSHALL, C. J.: "When the first legislature of "the Union proceeded to carry the third Article of the "Constitution into effect, they must be understood as in- "tending to execute the power they possessed, of making "exceptions to the appellate jurisdiction of the supreme "court. They have not, indeed, made these exceptions in "express terms. They have not declared that the appel- "late power of the court shall not extend to certain cases;

" but they have described, affirmatively, its jurisdiction; and
" this affirmative description has been understood to imply
" a negative on the exercise of such appellate power as is
" not comprehended within it. The spirit, as well as the
" letter of the statute, must be respected, and where the
" whole context of the law demonstrates a particular intent
" in the legislature to effect a certain object, some degree
" of implication may be called in, to aid that intent. It is
" upon this principle that the court implies a legislative
" exception from its Constitutional appellate power, in the
" legislative affirmative description of those powers."

SECTION LIII.

This doctrine: that the original and appellate powers of the supreme Court were granted by the people, and vested in that court as part of the judicial power of the United States, and that the statute was, as to that court, intended only to operate as an execution of the power of making exceptions to its appellate powers,—has never been denied by any adjudged case in direct terms; and, certainly, a principle, so carefully considered, and repeatedly decided, and supported by such conclusive reasoning, could not have been reversed without some direct reference to the intention to do so, and would not be by mere inference from the use of a single phrase. Yet, we find about 100 decisions, extending through the reports, from 1800 down to the present time, from which it might be inferred that the supreme Court derived its jurisdiction and power from Congress.

As an instance, the Court, by STORY, J., in *Crowell* v. *Randall*, 10 Peters, 391, speaking of Section 25, ch. 20, Judiciary Act of 1789, said: "That section *confers* appellate jurisdiction on this court," and afterwards, even to the present, notwithstanding the decision in 12 Peters, that the jurisdiction was given, and can only be taken away by the power which made and can alter the Constitution,—the same inaccuracy has been indulged, in speaking upon this subject, in all cases where the issue has not been directly on the Constitutional grant. For instance: In the 20th Howard it is thrice decided that the supreme Court

"derived no jurisdiction by virtue of the 25th Section of "the Judiciary Act"

Wayman v. *Morris*, 20 How., 3.
Christ Church v. *County of Philadelphia*, 20 How., 26.
Withers v. *Buckley*, 20 How., 34.

In the 22d volume it was held, in two cases, that the supreme Court had jurisdiction under the 25th section, viz:

Little v. *Arkansas*, 22 How., 193.
Berthold v. *McDonald*, 22 How., 334.

The fact that the form was so used long and continuously, before as well as since the case of Rhode Island v. Massachusetts, shows conclusively that no decision or ininference was intended contrary to the principles of the cases where the grant of the Constitution had been directly in issue, and that the use of the words was an inaccurate and almost inadvertent use of a popular expression.

SECTION LIV.

Let us now recapitulate and digest the authorities and principles, which have been developed, with reference to their direct bearing upon this case.

The principle advanced is, that the moment the supreme Court and the courts inferior thereto, were formed, they constituted a complete judicial department of the Government, and received by the direct grant of the Constitution, the entire judicial power of the United States. Where the original jurisdiction is not in the highest court, it is in the courts inferior thereto, vested by the Constitution, and only to be divested from the system, by the power which framed and can alter that fundamental law.

If this proposition is maintained, the motion to dismiss the suit for want of jurisdiction, must be denied.

The statutes, on which the motion is based, are powerless to oust it.

The questions, whether the complaint states facts sufficient to entitle the plaintiff to relief, or whether the matters stated are true, cannot be considered, at all, or decided, so long as its jurisdiction to hear the complaint or prayer, is disputed; for—jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them.

Rhode Island v. *Massachusetts*, 12 Peters, 657.

The question on trial is:

Has the Court jurisdiction over the parties and subject matter, in any form?

SECTION LV.

(1). In *Chisholm* v. *Georgia* (cited and quoted in Sec. 50, ante), the dissenting opinion covered all the courts without distinction. Justice Blair said: "After describ-" ing generally the judicial powers of the United States, " the Constitution goes on to speak of it distributively, " and gives to the Supreme Court original jurisdiction, " among other instances, in the case where a State shall " be a party." He does not say to what conservator the other cases were committed. The Constitution says, those powers shall be vested in one supreme and in such inferior courts as the Congress may establish.

Justice WILSON held, as the foundation of his decision, that by the Constitution "Legislative power is vested, " executive power is vested, judicial power is vested."

" The people formed " a national government complete " in all its parts with powers executive, legislative and " judiciary, and in all those powers extending over the " whole nation."

In Hayburns' case, which had just preceeded this, all the Judges, upon the most careful consideration, had determined that the Government was divided into three distinct and independent branches (2 Dall., 410, 411, 412); that the people of the United States had vested in one supreme court and in such inferior courts as the Congress shall establish "*the judicial power of the United States*" (ibid); and—acting not as a supreme Court, but as Courts inferior thereto—had, with the unanimous assent of the other members of those Courts, claimed and de-

clared that the judicial power of the United States had been direct to them.

Judge WILSON then spoke, considerately, and with well weighed words, in describing the Government as complete in all its parts, judiciary as well as legislative or executive.

CUSHING, Justice, did not separate the delegation. He quoted: "The judicial power shall extend to all cases," and based his judgment on the complete grant.

JAY, Chief Justice, saw no divided grant. From the Crown of Great Britain (he said) the soveriegnty of their country passed to the people of it. *They* instituted a national judiciary to remedy the people's evils; and, as the extension of its power is *remedial*, it was to be liberally construed.

By the strongest contemporaneous construction in both cases, and by the direct assertions of the several Circuit Courts, on the questions in Hayburn's case, it appears that, at the date of the Constitution, and for four years thereafter, no distinction as to the constitutional grant of power to the Supreme Court, and the courts inferior thereto, was understood to have been intended by the framers of the Constitution.

(2.) This understanding of the intention of the people, and the operation of their grant, extended to 1801, and then received the sanction of most carefully considered judicial determination, in *Wilson* v. *Mason*, 1 Cranch 91 and 92, in these words: "The Constitution of the United States "gave jurisdiction to the federal Courts in controversies "between citizens of different States. The same Consti- "tution vested in this court an appellate jurisdiction in all "cases where original jurisdiction was given to the infe-

" rior courts, *with only* 'such exceptions and under such " regulations as Congress shall make.'"

As original jurisdiction was not given to the supreme Court in controversies between the citizens of different States, this decision, that the Constitution gave jurisdiction in those cases to the federal Courts, is a decision, that the Constitution gave that jurisdiction directly to the Courts inferior to that court; and, if it was given in those controversies, it was, in the same grant, *given in all cases mentioned in the same section* in the Constitution,—and between the direct delegation of power to the supreme Court and to the Courts inferior thereto, there was no distinction.

And this is precisely the doctrine of *Marbury* v. *Madison*, 1 Cranch, 164. See Sergeant's Constitutional law, 44, 275, 276 to 278, 287 to 290 (2d edition), and cases cited.

This doctrine of the " constitutional right of a citizen of one State to sue a citizen of another State in the Circuit Court of the United States" has been repeatedly recognized.

Suydam v. *Broadnax*, 14 Peters, p. 75
Union Bank v. *Jolly's Adm'r*, 18 How., 503, p. 507.
Hyde v. *Stone*, 20 How., 170, p. 172.
Payne v. *Hook*, 7 Wallace, 430.
Commonwealth of Ky. v. *Dennison, Gov.*, 24 How., pp. 97 and 98.

(3.) The letter of the Constitution vests the judicial power of the United States in one supreme Court, and in the Courts inferior thereto. Not such judicial power as Congress may delegate, but, the judicial power of the United States is vested. (Sec. 2, ante.)

(4.) The absolute right to acquire, possess and enjoy property,—the formation of the nation, and enactment of the Constitution to protect that right, with others, forbid that the end and object of the formation of the government should be sacrificed to the means, and require that the Constitution should be most liberally construed, to extend complete and adequate power and means, to attain its ends. And in the grant of the whole judicial power of the United States, extended to all cases in equity as well as at law, we find the only means for the complete accomplishment of its ends. (Sec. 3, ante.)

(5.) The Government of the United States is divided into three distinct and independent branches or departments.

Only certain enumerated legislative powers are vested in the Congress; but, the whole judicial power of the United States has, by the people, been vested in the Courts.

(This we have shown in section 4, ante.)

(6.) The plaintiff has no remedy at law, and this remedy is guarantied by the Constitution. (Sec. 5, ante.)

(7.) The Constitution says, the property shall not be taken but by due process of law; and the legislature abrogates it and says, no Court shall enforce the Constitution and stay the seizure made without law.

Two objects moved the statesmen who framed, and the people who enacted the Constitution, to establish courts of justice,—and it may be presumed that they intended to give them powers adequate to their accomplishment:—

To establish justice, and to ensure domestic tranquility.

It is clear that justice is not established by the formation

of any system, by means of which property, which the citizen owns and has the right to possess and to enjoy, can be taken from him without law, without remedy or redress.

And it is equally clear that if such things can be done, uncurbed, domestic tranquility is not ensured.

Domestic concerns cannot be tranquilly carried on, with such dangers surrounding; nor would any considerable number tranquilly submit to such high-handed extortion. And a matter, which might easily have been remedied by individual application to the courts,—they having the power to remedy it,—might, being unremedied, in a single administration, breed rebellion and civil war.

(8.) One of the complaints against the king of Great Britain was, that he had obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

Courts they had; but judiciary powers, sufficient for the administration of justice, had been factiously or captiously withheld.

It is fair to presume that, having felt this want so keenly, the people intended the full meaning of their grant; and, as they vested in one supreme Court and in such inferior Courts as the Congress may establish, the whole judicial powers of the United States, they intended, by vesting, in whatever courts might be established, full power to administer justice in all cases, to prevent possibility of the recurrence of the evil, for which they had revolted, and to make it impossible to obstruct justice, by refusing laws for establishing judiciary powers.

(9.) "He has erected a multitude of new offices, and

" sent hither swarms of officers to harass our people and " eat out their substance."

Who was ever harassed more than this plaintiff? He has paid on everything;—and now the government will take a tax on nothing. The courts decide it cannot collect it by suit, and has no right to it at all; and it distrains his substance. Distressed by losses, he feels that he cannot pay; but it distrains all he has, and points him to the distant recompense of an expensive law suit. All this wrong, for which they rebelled, the people could have prevented by vesting the judicial power of the United States in the Courts, complete.

And their rebellion furnishes a rule of construction: It must be concluded that they meant what they said, and did not intend by implication to give to Congress or any President power to harass the people, and eat out their substance; and obstruct the administration of justice, by refusing the assent of laws for establishing judiciary powers that could remedy the wrong.

The legislature has not the power,—either among those enumerated in the Constitution or those necessarily incident to the enumerated powers,—to enact a void statute; nor, having enacted, to set sufficient power at work to execute it, and then, to make its usurpation effectual, to deprive the citizen of the protection of the judicial power of the United States.

Nor can it, in the exercise of those enumerated and incidental powers, destroy life or liberty, or divest property and, by taking away the remedy, evade the plain provision of the same Constitution that gave it all its powers: "No " man shall be deprived of life, liberty or property but by " the judgment of his peers or the law of the land."

The power is not only not enumerated, but, by this declaration, is forbidden; and such interference with the judicial department, is utterly inconsistent with the principle, so well established by the early cases, that this government is divided into three, not only separate, but also independent departments.

In this connection we are considering the logical result of the Constitution: If the court will not carry the Constitution to its logical end, and if we are compelled by the action of this court to accept the half-way doctrine, that the joint action of the people and the legislature were necessary, in order not only to establish, but also to empower the department, and that the dissenting opinion in *Chisholm* v. *Georgia*, is the law,—then we shall still insist that, as it took the joint action to give the power, joint action alone can take it away.

Such would be the rule if the joint constituents were equal in power; but when the one is infinitely superior, and empowered the other to join with it in the grant, merely for the purpose of more effectually carrying its design into effect,—by what reasoning can it be shown that the subordinate may, alone, withdraw the entire delegation for the very purpose (intentional or unintentional) of thwarting and defeating the design of the principal in its creation?

(10.) From the preceeding argument and authorities (Sec. 6), we have seen, that *the source of judicial power is in the Constitution alone, and the power is complete in the Courts;—*

That this is the doctrine of *Marbury* v. *Madison*:

"The laws of his country afford him a remedy"; and

McClung v. *Silliman*, and *McIntire* v. *Wood*, only decide that this remedy is not afforded by the Acts of Congress;—

Ergo: The remedy is afforded by the Constitutional grant of power.

The syllogism, based on the words "Constitute tribunal," has shown our premise (ante, Sec. 7.)

Contemporaneous construction, and the constant usage of Courts, from 1780 to 1800, and adjudged authority, show that Courts were fully constituted, merely by being called into existence. Therefore, the power to constitute tribunals did not name nor imply power to regulate process or define the powers; and, so constituted, they possessed, under the Constitution, the judicial power of the United States (ante, Sec. 7.)

The very essence of civil liberty requires, for its perpetuation, this construction of the grant. A contrary construction denies that liberty. Therefore, one of the most common and most approved rules of construction of statutes, requires that the most beneficent construction shall be given to the Constitution, if its words will admit of it. Its words clearly convey this construction; nor can they be construed in any other manner, unless a necessary implication, from the other words, forbid such a construction.

It is a further rule of construction that, where any mere implication from the words of a statute, is unbenignant or adverse to liberty or those things which are necessary to its complete enjoyment, or defeat, or tend to defeat the apparent design of the makers of the law,—such implication cannot be indulged, but is positively forbidden.

All these conditions unite to forbid the implication in question. And, as Courts of Justice, the Courts, once constituted, can, as a system, afford a remedy for every violation of right.

(11.) We have seen also (Sec. 7) that, though Congress —when necessary or proper for carrying into full and perfect execution the powers, committed to the judicial department by the people, and making them most efficient, according to the design of the Constitution—may prescribe process, divide the country into districts, and make many regulations to that end,—it cannot limit, or take away from that department, any portion of the whole judicial power of the United States.

(12.) We have seen also (Sec. 8) that the Courts of original jurisdiction are, as to all the cases mentioned in the Constitution, common law Courts of Justice, and, as such, can administer a remedy for every wrong.

(13.) We have also seen (in Sec. 9 and 10, ante) the derivation of the power of the Courts of England from the King, its fountain and source:—

That he had delegated his whole judicial power to the *Judges* of the several courts; that their power and jurisdiction cannot be changed without altering the Constitution of England; that, under this system, there could be no failure of justice, because the whole system has all the original absolute judicial powers of the King; that this system, with its absolute power to remedy every wrong, was the Constitutional right of every Englishman, and, as such, was brought to America as the right of every Colonist.

(14.) We have seen (in Sec. 11) that the Constitution, in the light of history, reads:—"As the *whole judicial power* of England is vested in, and distributed among her Courts, and the laws must be therein administered according to the power committed to their care—so we, the people of the United States, to *establish justice and secure liberty and*

domestic tranquillity, do vest in, and distribute among our Courts the whole judicial power of the United States ;

As the authority came from the Crown—whoever commissioned the Court or Judge—so we delegate without limit, and alone control, the judicial power;

As the greater security of the liberty of the subject was the object of prime solicitude,—so the greater security of the citizen's liberty is *our* first desire and object; he must find a remedy for every wrong, a protection from every usurpation, in the strong arm of the Courts. And when the power, which we, in order more perfectly to attain our object, have designated to give the commission, under our authority, has named the recipient, its authority, under that delegation, is *functus officio*.—It may pass all laws, necessary and proper to give the most complete effect to our grant, and attain our desire and object most perfectly, but not one, to limit the grant or defeat our design.

(15.) We have seen (Sec. 12) that, as the whole judicial power of England was committed to, and distributed among one supreme Court and Courts inferior thereto,—so Congress was empowered to constitute a like system, and no other, for America, and to keep that system sufficient for all the wants of the nation;

That as Congress accepted the delegated power, it is bound to exercise it; and its obligation furnishes the rule, that its Acts shall be construed so as to give the most complete effect to the design of the constituent; and any portion of its Acts which affect to limit the grant or prevent its full operation, must, as in other cases of trusts, be construed as *declaratory*, merely, or rejected as without the power. And in any system, constituted by Congress, must always have been found the power to protect the right.

(16.) We have seen (Sec. 13) that the subject matter of every violation of any right, claimed under the laws of England, was within the jurisdiction of every Court of superior jurisdiction, and is also within the jurisdiction of the Courts of the United States inferior to the supreme Court; and that the full power of Chancery is found in some Court of original jurisdiction, in the United States.

(17.) We have seen, by English comparison (Sec. 14), that *our* Courts are the people's courts, and exercise the judicial power of the United States, and, as incident to their existence, hold, distributed among the system, complete power to afford a remedy for every violation of right, and complete protection or redress from every wrong,—just as the people could have done.

(18.) In Section 15, we have examined the judicial Acts of the United States, and find them agreeable to this construction. They constitute the Courts, divide the powers among them, and, in other respects, are but declaratory, except where they exercise the constitutional right of regulating, or excepting from, the appellate jurisdiction of the supreme Court.

By Section 11, Act of 1789, the judicial power of the United States, in *all suits of common law or in Equity*, is assigned to the Circuit Courts. Under this assignment we have applied, in this suit, to the tribunal designated to hear it,—and—it has jurisdiction.

(19) In Section 16, we have examined this statute, by its title, by the *res gestæ*, by the Constitution, by three well-understood rules of construction, and by its own words,—and have found the system capable of receiving the power to administer the whole judicial power of the United States; and that the power to grant the remedies in the case at bar, was distributed to the Circuit Courts;

that it cannot again be divested, without destroying the effect of a Constitutional enactment; and that the power which assigned it, is *functus officio*, till the more effectual operation of the Constitution shall require a new assignment.

(20.) We have seen (Sections 17, 18, 19 and 20) that the doctrine, that we have no Common Law, considered as a source of jurisdiction, is a fallacy. (See *post*).

(21.) We have seen (Sections 21, 22 and 23) that the people, in the Constitution, vested the powers of Government in three departments, outlined a judicial system, and treated the powers granted to the judicial system or department as vested powers—directly vested by the Constitution.

(22.) That (Section 24) the word: "supreme," in the Constitution, was written as an adjective, to designate the highest in authority, with express reference to the use of the same word in England, to designate its Court of highest authority and ultimate appeal; and that there is no distinction in the people's grant of power, between the grant to the supreme Court and to those inferior thereto; that the judges of both are insured the same stability of office, and that to both, jurisdiction of parties and subject matter is given.

(23.) The word: "vest" (Section 25) gives an immediate or fixed right of present or future enjoyment of the powers named; and as soon as the system of Courts was formed, the grant—as with the executive and legislative departments—took effect, and an immediate and fixed right to all the powers assigned to the System by the Constitution, at once accrued.

(24.) We have analyzed the Common Law, and find it to consist of principles of justice, which are illustrated and ascertained in their application to myriads of individual cases, by Courts of Justice, ample to adapt themselves to, and protect, persons and property among the diverse local usages and customs of England and this Country, and to form the substratum and foundation of our Constitution itself. (Section 26). We have seen why these special remedies are granted, (Section 27), and that, in the United States, the law provides a remedy for every violation of right, as fully as the Common Law of England ever did, and by the same warrant. (Section 28.)

(25.) We have seen, (in Sections 28 and 29),—in the case which forms an era in judicial history,—that the power to remedy every wrong was vested in the judicial System, and that the Circuit Court had, from the Constitution itself, the power to hear this cause and give the remedy.

(26.) We have seen, also, that there is no remedy in State Courts, (Section 31), and, further, that whether there is, or not, does not affect the remedy in United States Courts.

(27.) We have analyzed the power of appointment, and find that such a power implies no power to control the appointee, vary the grant to him, or revoke the grant.

(28.) We have analyzed the words used in these connections.

(29.) We have sought, in vain, for a resting place for the judicial power, after the delegation and before the existence of a Congress,—and have found it in abeyance, only, not for Congress to receive it or hold it, but to invest the Courts when they should be created.

(30.) (Sections 39 and 40). We have sought, in vain, for any delegation of judicial power to Congress, or any authority to grant; and have found that the power to appoint Courts, was not a power to convey anything to them,—and have analyzed the formation of Courts, and the power delegated.

(31.) We have tested the construction by the spirit of the Act, and have found that, unless it, of itself, gives a remedy, it is hideous in deformity, false, worthless and meaningless;—we have found judicial authority, that, unless the power to grant the remedy, is vested, the case presents the monstrous absurdity in a well-organized government,—that there is no remedy, although a clear and undeniable right is shown to exist.

(32.) We have seen (Sections 45 and 46) that the question is, whether this monstrous absurdity, advanced in *McClung* v. *Silliman*, or honest justice, supported in *Marbury* v. *Madison*, is the law,—and have endeavored to answer it.

(33.) We have seen that no department was in existence when the grant of power was made, but each, when constituted, received the grant direct.

(34.) In Section 49 we have found a principle enunciated, not for that particular case only, but for all it could cover: "That the jurisdiction of the Courts of the United "States is properly commensurate with every right and "duty, created, declared or necessarily implied by and un- "der the Constitution and the laws of the United States. "Those Courts are created Courts of Common Law and "Equity; and, under whichsoever of these classes of juris- "prudence such rights or duties may fall, or be appro "priately ranged, *they are to be taken cognizance of* and

" adjudicated according to the settled and known prin-
" ciples of that division to which they belong."

(35.) We have seen (Sections 50 & 51,) that the Constitution vested in the supreme Court original jurisdiction in certain cases, and that its appellate powers are given by the Constitution, and not by the statutes (Sec. 52); and that the same Constitution, without any diversity in its operations, gave to the other Courts of original jurisdiction, jurisdiction in all cases named in the 2d Section of the 3d Article.

(36.) We have seen that the end of the Constitution could not be sacrificed to the means;—that, ever since Bracton, it has been deemed a sound maxim, in reference to grants of power to enforce laws, that " it would be super-
" flous to make laws, unless those laws, when made, were
" to be enforced,"—and that, from this very cause, it is to be presumed that, when, to protect the absolute right to acquire, possess and enjoy property, the people made the law: "No man shall be deprived of" * * " property
" but by the judgment of his peers, or the law of the land"
—they, in the same instrument, vested the power to enforce their enactment.

It was superfluous to make the law, if the matter of its enforcement was to be left wholly to the legislature; for, the legislature were as competent to make the law as to consider the expediency of enforcing it.

In fact, the Constitution was made to control the President and Congress; and thence it follows that, if made for them, and superfluous unless enforced, the power to enforce it exists outside and independent of them.

Ex parte Mulligan, 4 Wallace, 120.

(37.) We have seen that "it has ever been held, that an "exception of any particular case presupposes that those, "which are not excepted, are embraced within the grant "or prohibition; and that, where no exception is made "in terms, none will be made by mere implication or con- "struction." (12 Peters, 722.)

We find the grant of judicial power in the words: "shall "be vested in one supreme Court and in such inferior "Courts as the Congress may, from time to time, ordain "and establish." In certain cases the supreme Court shall have original jurisdiction; "*In all the other cases before* "*mentioned*, the supreme Court shall have appellate juris- "diction, both as to law and fact, with such exceptions "and under such regulations, as the Congress shall make."

Tested by the rule, we find that, as Congress has the Constitutional power of making exceptions in the cases, granted to the appellate powers of the supreme Court, it has no power to except any other cases, mentioned, from the jurisdiction to which they are assigned.

Again: No exception is made, in terms, of any of the cases mentioned, from the jurisdiction of the inferior Courts to which they are assigned, and by this rule: "as no ex- "ception is made in terms, none will be made by mere "implication or construction."

(38.) We have examined the subject in every light which ingenuity can suggest; we have tested the Constitution by every touchstone we can discover,—many of them sanctioned by the highest authority, in the same connection;—

And, by every rule of construction, by every principle of justice, by every well argued and considered case, we have been led back to the same principle, that: the mo-

ment the system was created, it took, by direct grant from the people, all the judicial power of the United States; and that Congress has power to pass such laws as may be necessary or proper to carry the people's delegation to the Courts, into most perfect effect,—but no power to limit or hinder its effect in any form.

SECTION LVI.

Against all this authority we find ranged certain cases, which we will recapitulate:

In Section 17, we have re-examined Chancellor KENT's examination of the question "whether the Courts of the "United States have a common law jurisdiction, and, if "any, to what extent;"—and have seen that, to, and including, the case of Hudson & Goodwin, nothing had been decided, and that, though the ex-Chancellor had made quite an effort to extract some rule which he could deliver to his students, as their guide, his lecture but mirrors his perplexity, and he is compelled to shift the responsibility of the opinion, he inculcated, upon an Essayist, being too good a lawyer himself to assert that "the jarring opinions and decisions" had settled anything.

Up to that time, the question, in the light in which he reviewed it, had received but one clear, logical, exhaustive discussion, and that was, immediately after the only case in which the doctrine, that the courts had not a common law jurisdiction in criminal causes, had been squarely raised; and in that (1 Gallison, 488) Judge STORY had reversed the case of Hudson & Goodwin; and when it came to the supreme Court, every member of the Court, but one, apparently desired a re-argument; but the indolence of the Attorney General thwarted them, and they let it pass, saying, that whenever any person could be found to argue the question, they would divest themselves of the influence of the former case.

It is probable that the question as to criminal matters, will not again soon be raised. The crimes, not included

in the statutes, are few and far between, and are generally small; and no Circuit Judge will charge a Grand Jury to indict and, upon the defendant being convicted, will certify a division of opinion to the Supreme Court, until some case, of sufficient importance to interest the Attorney General, shall cause him to press the question, and assure, its argument in the Supreme Court.

Yet, nothing has really been decided; and we are indebted, not to the cases, but to the essayist, for the prevailing impression, that the principle was fixed by the decisions.

Chancellor KENT, having spent an active life in the administration of State jurisdictions, being thoroughly versed in Common Law and Chancery, having had no acquaintance with any limited jurisdiction which was not inferior, driven from his proper position by an unwise limitation as to age,—became the oracle of a student class, and, with this single exception, was a master of the questions he discussed. This question he, in vain, tried to settle, but confessed it intricate, perplexed and unsettled, and then quoted the essayist who, with less discretion, had attempted to work a legal principle out of a metaphysical discussion.

The Chancellor does not commit himself, but says, the essayist "maintains" (p. 339); and (p. 342), in closing the reference, says in effect: "Even in the Essayist's view, the "common law may still be cultivated, as part of the juris-"prudence of the United States." Closer reading than law students give, is necessary to see, that the Chancellor refused to endorse the essayist's argument with his authority. And thus, for some 45 years, the earliest impressions of almost every lawyer in the Country, have accepted as a principle, inculcated by Chancellor Kent, a doctrine, which he merely quotes as having been advanced by an "able" essayist.

Before leaving this class of cases, it is to be noted that, in the first case (that of Worrall, 2 Dal., 384),—though an opinion by the Circuit Judge, that the Court had no jurisdiction or power, was filed, and an adverse opinion by the District Judge,—it is evident that the Circuit Judge abandoned his opinion; for the Court gave judgment and sentenced the prisoner,—a thing, impossible for an honest Judge, if he believed the prisoner was not within his jurisdiction, and that he was committing an act of usurpation without the authority of law, entering a judgment, from which there was no appeal, and committing an outrage, for which there was no redress.

The sentence was mitigated, not from any doubts as to the power to sentence, but from consideration of the defendant's circumstances.

In the case of *United States* v. *Hudson & Goodwin*, the Court said: the only question which this case presents, is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases. And, if fully and finally decided against us, it would be very questionable, whether it would be a precedent against the claim of a citizen to the enforcement of a direct enactment of the Constitution by the judicial department, organized by the people, for the purpose of enforcing and protecting that fundamental law, and accomplishing its designs.—But, as the argument, rehearsed, though not sanctioned by Chancellor Kent, had its rise in these cases, it may be well to consider the circumstances of this one:

England had pursued a course, which led to the war of 1812; to oppose which, having no navy, it was necessary to resort to other means; and the National Government laid an embargo on all our sea-ports, preventing trade,

and, for nearly a year, compelling idleness in marine industries, and a cessation of marine commerce. About the same time, Tunis and Algiers having by their piracies obtained tribute by way of commutation, Napoleon adopted the same course, and committed the spoliations, seizing many of our vessels, and confiscating them and their cargoes, hoping thereby to make us also tributary to him, and in the end to force us into an alliance against England.

The course of the General Government towards France, has never been accounted for, unless it arose from timidity; and the people of the sea coast, and especially Connecticut, reduced, both by the embargo and by the spoliation, to idleness, poverty and great distress, evinced strong dissatisfaction at the abject condition of the government, and hopeless state, to which its policy was fast reducing them.

A plot for a rebellion was formed, and political factions grew very rancorous and bitter in their spirit; and, among their ebullitions, one of the newspapers charged the President and Congress with having, in secret, voted two millions of dollars as a present to Bonaparte, for leave to make a treaty with Spain.

Contemporaneous history says that the rebellion was quenched; and, while, from party feeling, many were exceedingly bitter, upon both sides, and many influential persons urged the prosecution of every prominent agitator, the more thoughtful were in favor of passing over the matter in silence, and giving time for the discontents to heal. In this view, it was deemed the better policy to let the prosecutions, which had been commenced, die out; and thus the irritating case of Hudson & Goodwin terminated.

Under such circumstances it is easy to see that the Court really sought a pretext to discharge them, and found

it in the opinion which Judge STORY understood to have settled nothing, and which, in the case of Coolidge, the Court, with one exception, agreed should be stripped of its prestige as *res adjudicata*, whenever an argument should be made. And that is the condition, to-day, of the question whether the Circuit Courts of the United States have a common law jurisdiction in cases of crimes against the United States.

SECTION LVII.

The cases of *Shelden* v. *Sill*, 8 How., 441.
Turner v. *Bank of America*, 4 Dallas, 8.
Gibson & Martin v. *Chews*, 16 Peters, 315, and
Dromgoole v. *Farmers & Merchant's Bank*, 2 How., 241,

were decided upon part of the 11th Section of the Judiciary Act, which declares, that no District or Circuit Court "shall have cognizance of any suit to recover the contents "of any promissory note, or other chose in action in favor "of an assignee, unless a suit might have been prosecuted "in such Court, to recover the said contents, if no assign- "ment had been made."

And, it was a mistake, to put a constitutional argument into the cases, or the opinions.

In the case of *Turner* v. *The Bank of America*, it is to be observed that, though there is an argument and, apparently, some "side talk" on the subject, the opinion of the Court does not mention or allude to it.

The judgment was reversed for this error, that, in the record in the Circuit Court—it being a Court of limited jurisdiction,—it did not appear that the assignors of the chose in action sued on, were citizens of a different State from the defendant.

At common law, a chose in action was not assignable, so as to vest in the assignee a right to sue in his own name.

A promissory note was so assignable; but the right of

the assignee to sue in his own name, was not a vested right of property, guaranteed by any principle of natural law, but was subject to the control of the legislature, or even of the local usage of every State: This right was, then, to be granted, denied or qualified by the legislatures of the several States, just as the policy of each State should require. But, if promissory notes, or choses in action, were to become articles of commerce among the several States, then Congress, under the Constitution (Art. 1, Sec. 8, 3), has the power to regulate the commerce in them;—and one of the first items of such regulation would be, to provide, in whose name a suit on the assigned chose, might be brought.

It might be very impolitic to permit a chose, which had been executed under the laws, and with express reference to the local remedies of a particular State,—to be removed to another jurisdiction and different remedies, by sale and assignment; and, in this view, the only questions to be decided, were: (1.) Had Congress regulated this commerce? and (2.) Had Congress forbidden a chose, so accruing, to be removed, by inter-state commerce, beyond the jurisdiction of the local remedies?

The answers being in the affirmative, the Circuit Court had no jurisdiction.

In the case of *Sheldon* v. *Sill*, parallel facts required the same decision.

Congress, in regulating commerce among the States, had so regulated it, that the purchaser of a chose in action must stand precisely in the place of his assignor, as to the locality of his remedies; and the controversy must be that of the assignor, or a precise substitute.

That controversy was not within the jurisdiction, as-

signed by the Constitution, at all; therefore, a decision on what would have been the rule if that controversy had been within the jurisdiction assigned, is simply obiter.

We will, however, examine the obiter remarks:

The Court says: (1.) "It must be admitted that, if the "Constitution had ordained and established the inferior "Courts, and distributed to them their respective powers, "they could not be restricted or divested by Congress."

We have seen that the Constitution had distributed the the judicial powers of the United States between the supreme Court and the Courts inferior thereto, and must dissent from the following premise:

"But as it has made no such distribution,"—and the conclusion drawn:—"one of two consequences must re-"sult: either that each inferior Court, created by Con-"gress, must exercise all the judicial powers not given to "the Supreme Court, or that Congress, having the power "to establish the Courts, must define their respective "jurisdictions."

Now, the Constitution distributed the judicial powers: part of them to the supreme Court, and part to the Courts inferior thereto,—but did not distribute them among those inferior Courts; if it is "necessary and proper, for carry-"ing into execution the powers vested by the Constitu-"tion in the judicial department of the Government of "the United States or in the Judges thereof," a power was given in terms: By the Constitution (Art. 1, Sec. 8, 18), Congress has the power to distribute them; and till such distribution be complete, any Court would have all the powers not assigned to another.

The Court proceeds: "The first of these inferences has

never been asserted, and could not be defended with any show of reason."

It will be observed that the argument for this jurisdiction was very meager: But two cases were cited, one of which did not support the position intended to be maintained by it, viz: that the debt and mortgage did not constitute a chose in action; and the other: *Marbury* v. *Madison*, which decides that the laws outside of the statutes afford a remedy for every wrong;—that the remedy was provided within the power of the Courts, but not of that Court, because the Constitution had distributed it to another, —might as well not have been cited, at all,—for, it was not comprehended. The Court said, hastily, that the position could not be defended with any show of reason. If I have made any show of reason, if the cases cited, have any reason in them, then it is clear that the Court was uninstructed, and had not examined the effect of its language; and its decision could be entitled to no weight as a rule, though not obiter. And we are in the condition Dwarris mentions: appealing from a prince uninformed, to a prince better informed.

The question, whether the jurisdiction of the Court, in such cases, is taken away by this section of the Judiciary Act, is subject to a very simple test: If suit should be brought in the federal Court, upon a promissory note, made by a citizen of Illinois, to one, in the declaration alleged to be a citizen of the same State, or to one, whose residence is not mentioned, and by him assigned to a citizen of another State;—due personal service of process, default or appearance, plea, trial, verdict, judgment and execution, and sale and deed of land thereunder,—and the purchaser should go into possession, and, after the lapse of such time

as to bar a writ of error on the judgment, the original defendant brings ejectment against the purchaser,—would the judgment and deed be a bar?

If this statute affects the jurisdiction of the Court, it could not be a bar; for, the Court being without jurisdiction, its action would be *coram non judice*, and void. Nor could the plea, trial and verdict assist it; for, we have seen that consent of parties cannot confer jurisdiction over any subject matter, not within the jurisdiction of a Court.

And it would make no difference whether it appeared that the assignor was a citizen of Illinois, or not; for "nothing will be intended in favor of the jurisdiction of Courts "of limited jurisdiction."

Rex v. *Inhabitants of Chilverscoton*, 8 T. R. 181, 182.

Bac. Abr. Title Courts, "D" 4.

(See Bouvier's Ed., for U. S. authorities.)

SECTION LVIII.

In *Kendall* v. *The United States*, 12 Peters, 616, et seq., all that was said on the subject was based on *McIntire* v. *Wood* and *McClung* v. *Silliman*, and was not at all necessary to the decision of the case; for, the statute being slightly broader as to the powers of the Circuit Court for the District of Columbia, the Mandamus was issued, and the very thing done which was refused in the cases remarked upon.

SECTION LIX.

The case of *Cary* v. *Curtis*, 3 Howard, 245, was one which seems to have involved the principle that a ministerial officer, proceeding on a warrant, regular on its face, is not liable for his ministerial acts, and is put substantially on that ground.—That the question of jurisdiction was only incidentally mentioned, appears from the remarks following, that, "while it has been deemed proper, in ex-
"amining the question referred by the Circuit Court, to
"clear it of embarrassments, with which, from its sup-
"posed connection with the Constitution, it is thought to
"be environed,—this Court feels satisfied that such em-
"barrassments exist in imagination, only, and not in reality;
"*that the case and question now before them, present no in-*

" *terference with the Constitution*, in any of its provisions, " and may be, and should be disposed of on the plainest " principles of common right."

The plaintiffs had paid the defendant, as collector, $181, claimed as duties, and then sued to recover it back. There was no division of opinion as to the jurisdiction in the Circuit Court; for, it had entertained the suit, tried it, and taken the verdict of the jury. No motion to dismiss, or other question upon the jurisdiction, appeared in the certificate of division.

The case had been tried on the merits; and on the merits the decision was made. (See page 247): " So far as the " liability of agents in this form of action, appears to have " been considered, the general rule certainly is, that the " action should be brought against the principal, and not " against a known agent, who is discharged from liability " by a '*bona fide*' payment over to his principal, unless, " anterior to making payment, he shall have had notice " from the plaintiff of his right and of his intention to " claim the money. The absence of notice will be an " exculpation in every instance; and with regard to the " effect of the notice, in fixing liability upon the agent, " that effect is dependent on the known powers of the " agent, and the character of his agency. If, for instance, " the agent was known to be a mere carrier, or vehicle, to " transfer to his employer the amount received, payment " to the agent, with such knowledge, although accompa- " nied with a denial of the justice of the demand, would " seem to exclude every idea of an agreement, express or " implied, on the part of the agent to refund; and could " furnish no ground for this action against the agent who " should pay over the fund, received, to his principal. This

" doctrine is belived to be sanctioned by the cases of *Green-*
" *away* v. *Hurd*, 4 T. R., 553,—of *Coles* v. *Wright*, 4 Taun-
" ton, 198, and of *Tope* v. *Hockin*, 7 Barn. & Cres., 101.
" 'Tis true that the case in Taunton, and that from Barn-
" well & Creswell, were not instances of payment under
" protest; but the case from 4 T. R. has this common fea-
" ture with that before us, that it was an action against an
" excise officer for duties, said to have been illegally col-
" lected, in which the plaintiff denied the legality of the
" demand, though he subsequently paid it. But all three
" of these cases concur in condemning the hardness of a
" rule which would subject an agent, who is a mere chan-
" nel of conveyance, or delivery, of the amount which
" might pass through his hands. Neither of these cases
" was affected by a positive statutory mandate, requiring
" the agent to make payment over to his principal."

Having thus, and on the following page, established the principles on which an action for money, had and received, could be maintained against an agent, the Court (p. 249) recapitulates them, and brings the case to the test of those rules: considering the Act of Congress in question (upon which the question that had been certified, was: is it a bar?) and, finding that that Act required the collector immediately to pay the money over to the Treasury, continues:

" With full knowledge thus imparted by the law, can it
" be correctly understood that the party making payment
" can, *ex equo et bono*, recover against the officer, for act-
" ing in literal conformity with the law, converting there-
" by the performance of his duty into an offence; or that,
" upon principles of equity and good conscience, an obli-
" gation and a promise to refund shall be implied?" * *

* * * The answer is negative.—"The claimant, "moreover, was not without other modes of redress, had "he chosen to adopt them. He might have asserted his "right to the possession of the goods, either by replevin "or in an action of detinue, or, perhaps, by an action of "trover, upon his tendering the amount of duties, admitted "by him to be due.

"The legitimate inquiry before this Court, *is not, whether* "*all right of action has been taken away from the party*, "and *the Court responds to no such inquiry. The question* "*presented for decision, and the only question decided*, is, "whether, under the notice given by the statute of 1839" (that it is the duty of the officer to pay over the money at once), "payments, made in despite of that notice, "though with a protest against their supposed illegality, "can constitute a ground for that implied obligation to "refund, and for that promise inferred by the law from "such obligation, which are inseparable from, and are, in-"deed, the only foundation of a right of recovery in this "particular form of action; and here is presented the an-"swer to the assertion that, by the Act of 1839, or by the "construction given to it by this Court, the party is debar-"red all access to the Courts of Justice, and left entirely "at the mercy of an executive officer. Neither have Con-"gress nor this Court furnished the slightest ground for "the above assertion."

Upon this case it is clear, that the Court believed that the goods could be replevied from the officer; and as no judicial power, less than that of the United States, would have power to take the property, by force, from the possession of the United States, the federal Court must have had jurisdiction.

However that may be, we have the plain declaration that the case does not decide any point adversely to that position.

SECTION LX.

The case of *The Bank of the United States* v. *Devaux*, 5 Cranch, 61, has been cited to support the necessity of legislative grant, to give the inferior Courts jurisdiction. At page 84 et seq. we find the two points considered in the case:

(1.) "That a right to sue in the federal Courts is con- "ferred on this bank, by the law which creates it."

And it was decided that it was not.

(2.) "That a corporation, composed of citizens of one "State, may sue a citizen of another State, in the federal "Courts."

And this point was affirmed.

The decision of the first named point was thus expressed: "This power" (to sue), "if not incident to a corporation, "is conferred by every incorporating act, and *is not under-* "*stood to enlarge the jurisdiction of any particular Court*, "but to give capacity to the corporation to appear as a "corporation in any Court which would, by law, have cog- "nizance of the cause, if brought by individuals. If juris- "diction is given, by this clause, to the federal Courts, it "is equally given to all Courts having original jurisdiction, "and for all sums, however small they may be."

This quotation shows that the question before us was not considered in considering that point. The decision on the other point is based (p. 87) on the position *that the Constitution had conferred*, and *the Circuit Court was bound to exercise, the jurisdiction* in the case named.

This was the old United States bank; and it will be seen that, though the corporation did maintain its suit in that case, it was expressly held that the law, creating it, gave no jurisdiction to those courts.

This decision was based on the doctrine, that a corporation is the creature of the law creating it and giving it power to act. 2 Cranch, 150.

Such statutes not only create an artificial person, "but "give it every faculty which it possesses: The power to "acquire rights of any description, to transact business of "any description, to make contracts of any description, to "sue on those contracts,—is given and measured by its "charter. This being can acquire no right, make no con- "tract, bring no suit, which is not authorized by law. It "is not only itself a mere creature of a law, but, all its ac- "tions and all its rights are dependent on the same law." (9 Wheat., 823.)

Afterwards, the new bank being formed, it brought suit in the Circuit Court, and the jurisdiction was contested on two grounds:

(1.) That the Act of Congress had not given it

(2.) That, under the Constitution, Congress cannot give it.

On the first point the Court says (*Osborn* v. *U. S. Bank*, 9 Wheaton, p. 817): "The words of the charter are: "'the bank shall be made able and capable in law to sue "'and be sued' * * * 'in all state courts, having "'competent jurisdiction, and in any Circuit Court of the "'United States.' * * * "These words" * * * "cannot be made plainer by explanation. *They give ex-* "*pressly the right 'to sue and to be sued'* in every Cir- "cuit Court of the United States.

"The argument of the appellants is founded on the "opinion, of this Court, in *The Bank of the United States* "v. *Devaux*, (5 Cr., 85). In that case it was decided, that "the former Bank of the United States was not enabled, "by the act which incorporated it, to sue in the federal "Courts."

And thus the first point was answered.

The second point was answered by citing (p. 819) the clause: "The judicial power shall extend to all cases in "law and equity, arising under this Constitution, the laws "of the United States" &c., determining that "this "clause enables the judicial department to receive juris- "diction to the full extent of the Constitution, laws and "treaties of the United States, when any question, respect- "ing them, shall assume such a form that the judicial "power is capable of acting on it. That power is capable "of acting, only when the subject is submitted to it by a "party who asserts his rights in the form prescribed by "law.

"It then becomes a case; and the Constitution declares "that the judicial power shall extend to all cases, arising "under the Constitution, laws and treaties of the United "States."

The Court proceeds to analyze the effect of an Act of incorporation, to give every faculty that the creature possesses, and finds, that the question, respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular cause, and may arise in every cause; and that any case, which it is possible for the corporation to have, must arise under the law of the United States which creates it.

The questions were inaccurately stated. The first was, really: Does the charter impart to the corporation the right to sue in the federal Courts? And the answer is: it does, if Congress had the power to confer it. The second: Had Congress the power to impart this right as a corporate franchise?—was answered in the affirmative.

The inaccuracy of assuming, that this statute conferred jurisdiction on the Court is shown by the other clause, which empowers the corporation to sue in State Courts, who derive their authority from the States, and to whom the Government of the United States could give no judicial authority; and also by the reasoning in *U. S. Bank* v. *Devaux* (cited ante), in which it was determined that the charter granted no jurisdiction to the Court, but only operated to give capacity to the corporation to appear, as a corporation, in a Court which would, by law, have cognizance of the cause, if brought by individuals. "If jurisdic-" tion is given," says the Court, in dismissing the proposition, "it is equally given for all sums, however small they "may be."

These two cases, then, decide, not that the statute conferred any new jurisdiction on the Court, but that, creating the corporations, they conferred on them some of the franchises which citizens would have possessed, and which, but for the statute, the corporations could not have exercised.

SECTION LXI.

Ex Parte Cabrera, 1 Washington Circuit Court Reports, 232, was a case where a person, attached to the Legation of Spain, being confined under process from a State Court, was brought before the Circuit Court on a writ of habeas corpus, and sought the intervention of that court, under an Act of Congress, that all State process against the person of any public minister, or of his domestic, shall be deemed null and void.

The decision is in a nutshell (p. 236): "This law is not "less obligatory on the State Courts and State Judges, "than upon those of the United States. If a public min- "ister be sued in the latter courts, it will be the duty of "those courts to quash the process, as altogether void. If "he be sued in the former, that court is equally bound by "the same law to give the same decision. The injured "party may also have redress against the aggressor, in "either court, or may prosecute him under the 26th Sec- "tion of the law. It is one thing to declare the process "void; but, another to define the tribunal which is to de- "cide. The natural tribunal is that, where the process is "depending, or which has the superintending control over "said courts."

We have seen that the court, in possession of the cause, has the exclusive right to decide whether it has jurisdiction, or not (ante—). And, as that is all there is to be decided, the chance expressions, thrown into this case, are not adjudicated.

United States v. *Bevans*, 3 Wheaton, 336. The decision was, that a murder, committed on a bay within the juristion of a State, was not cognizable in United States Courts. That, though it was competent for a government, which possesses the broad power of war, "which may provide and "maintain a navy," which "may make rules for the gov- "ernment and regulation of the land and naval forces," to punish an offence, committed by a marine on board a ship of war, wherever the ship may be, it had not exercised the power. This case refers the power of Congress, in the premises, to an entirely different part of the Constitution from that of ordinary Courts.

SECTION LXII.

Thus we find, that the four cases upon the common law jurisdiction of the Court in criminal cases, have settled nothing;

That an Essayist attempted to reconcile them, and produced an argument, which, being introduced to every lawyer in the country, while he was young, unreasoning and pliable,—formed the common prejudice of the bar, upon a theory devoid of foundation in authority;

That the cases, based on the rights of assignees of choses in action, are referable to an entirely different clause of the Constitution, and that the statute operates to regulate commerce, instead of limiting the power of the Court;

That the case of *Kendall* v. *The United States*, mentioned *McIntire* v. *Wood*, and *McClung* v. *Silliman*, merely to take a distinction between them and the case at bar, and adjudicated nothing;

That the case of *Cary* v. *Curtis*, which at first seems very strong against us, runs out entirely, and expressly states that but one question was decided, and that was, as to the merits of the defence interposed;

That the two United States Bank cases do not decide that the statutes conferred any jurisdiction or power on the Courts; but that they imparted a power to perform a particular act in a particular manner, to a corporation, which had no power to act, at all, except that derived from the Act;

That the case of Cabrera was already in a forum, over

which the Circuit Court had no supervisory control, and could not have; and that of Bevans was cognizable by a State, and only capable of being brought under the judicial power of the United States, by regulations to govern the land and naval forces.

And this leaves *McIntire* v. *Wood*, and *McClung* v. *Silliman*, the only cases in which the Constitution is referred to; and these we have discussed in Sections 30, 32, 36, 37 and 39, ante, and have shown them utterly irreconcilable with numbers of cases, which are regarded as sound law, to-day, and the principles on which they are based. These cases of McIntire and McClung are, like the case referred to in *Marbury* v. *Madison*, to be understood to have decided that a mandamus ought not to issue in that case, and to have settled the merits of all like cases.

SECTION LXIII.

The foregoing are the cases which are referred to in discussions upon this power, and are the only cases in which the constitutional grant of power has been denied. And it will be seen that the single case of *McClung* v. *Silliman* is the only one, in which the opinion and decision of the Court claims, or purports, to be based on the doctrine, that the Constitution vested judicial power in Congress, which it may delegate or refuse to the Courts, at its pleasure.

These cases, evidently, had no argument, and no careful consideration of the Court. For, if the principles and precedents, by which the Constitution is and must be construed, had been before the Court, at all, they could not be ignored and the entire power made out by a single inference. And in the face of, and to balance these exceptional cases, we have presented many, carefully examined cases, utterly inconsistent with and, sometimes, in words directly opposed to their doctrine.

As both cannot be the law; and as the reasons, given in the cases we have first presented, are cogent and conclusive, and never questioned in any case,—we are brought to the conclusion, that it is the settled law, that the power of the Courts inferior to the supreme Court, is vested in the system by direct grant from the people. And that, when the people granted to Congress the power "to make all laws "which shall be necessary and proper for carrying into "execution the foregoing powers and all other powers, "*vested by this Constitution* in the *Government* of the "United States, *or in any department or officer* thereof," they, by necessary implication, forbade Congress to make

any law to hinder the carrying into execution of any power, granted to the government, or to take away from the government any means necessary to carry the Constitution into effect.

That when—to secure liberty, establish justice and insure domestic tranquility—the people made the law, that no man should be deprived of his property but by the judgment of his peers, or the law of the land, and provided means for its enforcement,—and the Government has, in its judicial department, actually had and exercised the only means capable, under some circumstances, of enforcing the law—they, by granting to one department power to make laws to carry this power of government into effect,—forbade that department to prevent the execution of the power, directly or indirectly, by sacrificing the end and object, through the means.

And the statute, which virtually forbade the Government of the United States to entertain this suit; as well as that, which repeals, and would take away from that government, the power to adjudicate causes, arising solely under the Constitution and laws of the United States, being authorized neither among the enumerated powers, nor among those *necessarily* implied therefrom—are without authority.

SECTION LXIV.

In the face of these principles appears, finally, the case of *The Provident Insurance Co.* v. *Ritchie*, 5 Wallace, 541. Its existence, and presentation as the basis of this motion, have required the full examination of the question from its foundation; and, in view of the principles developed, it now behooves us to reconcile the case with our determination, if we can.

The first point observed, in reading the case, is, that it is decided solely by collation of statutes.

(Second): That the Constitution is not mentioned in the case, in any form.

From which it appears that no argument, in support of the jurisdiction, was made, except upon the language of the statutes; for, had the constitutional delegation of jurisdiction to the Court, as belonging to an independent department of the Government, been seriously pressed, it could not have been overlooked.

It is frequently stated, by the Supreme Court, as well as by the Appellate Courts of the several States, that it approaches constitutional questions with reluctance, and will very rarely, or never, raise a constitutional question against the validity of a statute, where it is not raised by counsel in argument. Hence it follows, that a case, based upon the construction of a statute, is not a precedent in favor of its constitutional validity.

We have seen how the *argument*, quoted by KENT, has colored the ideas of every law student, for nearly fifty years, and had probably laid the foundation of the im-

pressions of most of the Judges, as well as the counsel. The undue prominence given to the isolated expressions upon surrounding subjects in many "mild" law books, whose authors, making very fair compilations, look wise, and speak, like parrots, the words and uncomprehended sentences of other men,—has also done much to continue the hasty or superficial examiner, in the same idea,—that it was adjudged and settled law. And, as the point seems, in this case, to have been sprung in the Supreme Court, at the final hearing,—the fact, that the constitutional question was not raised, is accounted for on the most natural principles.

As the constitutional question was not raised or considered, *and was not decided*,—the case is not a precedent against us, standing on our constitutional guaranty and the constitutional power of the Court alone.

SECTION LXV.

In conclusion: It may be proper for me to suggest that I have, for months, believed that this was the most important single question ever presented to this Court for decision;—that I have given it the study and thought, which its dignity and importance demand, so far as my abilities would permit, and other duties would afford the time. The other matters, which arise in the case, are simple. The Government officers will not sue on the bonds, because *no breach can be proved*, for, no liability exists; and upon their answer, the cases will be at an end.

We have sought their answer upon their oaths, purposely leaving out of the motion for injunction all affidavits to counterbalance their answers. Relying solely on the justice of our cause and their integrity, we have so placed the case that, had the facts warranted it, they could have answered us out of Court.

In the case of *Lemuel W. Mason* v. *Edward A. Rollins et al.*, now in this Court, I have pursued the subject in such order as to ascertain clearly the full import of the words JUSTICE and LIBERTY as used in the Constitution.

That case is nearly parallel, but far more comprensive than this, and I will ask the Court to examine the *second* division or chapter or the argument in that case before deciding this.

The following sections consider the question of jurisdiction, as more intimately applied to the facts disclosed by the pleadings, and the remedy proper therefor.

SECTION LXVI.

The provision, adverse to this application, is found in the Act of July 13, 1866, Section 19:

* * * "and no suit, for the purpose of restraining "the assessment or collection of a tax, shall be maintained "in any Court."

We will take the English view; and this is *excepted out of the statute:*

1st. Section 1, of the Act of July 20, 1868, provides that there shall be levied and collected on all distilled spirits &c., a tax of 50 cents per gallon, to be paid by the distiller before the spirits are removed from the distillery; and the tax shall be a lien &c., *from the time said spirits are distilled* until said tax be paid.

Sec. 4, defines distilled spirits, and provides that "the "tax shall attach to this substance *as soon as it is in exis-* "*tence.*"

These are the only provisions of the statute which lay the tax of 50 cents per gallon.

Sec. 59, requires distillers to pay $4.00 per barrel, on each barrel produced * * *.

They do not lay a tax of any sort upon spirits, before their existence; nor is there any provision in them that makes any man liable for a tax on anything but proof spirits, or alcohol in some form of existence;—and that, which never existed, is not alcohol—is nothing—; these provisions do not tax that.

2d. Statutes, contrary to the law of nature and right reason, are void.

Dr. Bonham's case, 8 Co. Rep. 118.
Stockdale v. *Hansard*, 9, A. & E. 93.
Ham v. *McClews*, 1 Bay 93, South Carolina, 1793.
License Tax cases, 5 Wallace, 469.

It is unreasonable to fine a man for not producing or having skill, or to tax him on nothing, or for nothing.

Statutes should be construed in harmony with justice, reason and the Constitution; and, in order to support them, *must* and *shall* may be construed to mean *may*,—and the whole Section 20, may be considered as merely directory.

3d. Statutes, which abridge the liberty of the subject, ought to receive the strictest construction.

(Dwarris, 646.)

It is a well settled rule of law that every charge upon the subject, must be imposed by clear and unambiguous language. * * * Statutes, which impose a duty upon the public, will be critically construed with reference to the particular language in which they are expressed.

Dwarris, p. 646.
8 East., p. 245.

Where there is any ambiguity found, the construction must be in favor of the public.

A tax shall not be considered to be imposed, without a plain declaration of the intention of the legislature to impose it.

Dwarris, 646.
Dock Co. v. *Brown*, 2 B. & Al., 58.
Company &c. v. *Hustler*, 1 B. & C., 425.

In this case a canal Act directed that, no boat, navigating thereon, of less burthen than 20 tons, or which should not have a loading of 20 tons on board, should be allowed to pass through any of the locks, unless on payment of tonnage equal to a boat of 20 tons. Held that the clause did not impose a toll upon empty boats,—that the burthen must rest upon plain, unambiguous language.

The whole statute abridges the citizen's liberty, and, in terms, lays a tax on existing things, as above set forth; it could only be said to lay a tax on these deficiencies, these non-existent articles, by a most liberal construction of Section 20; and a liberal construction against the citizen, is not permitted. It is unjust to require a man to pay a tax on nothing, and unreasonable to charge such an one with heavy burdens; for, if he makes nothing, he has nothing to protect, and should pay nothing but the poll tax, by the law of nature.

This assessment is void on its face.

The tax is laid on nothing.

Section 20, is directory, only: not mandatory; and the assessor cannot follow the rule, unless he believes it will enable him, correctly to ascertain the amount produced.

The tax, based on the void assessment, laid on nothing, and without express words, equivocally, and charged by an arbitrary and false rule, has nothing to rest upon, and is void.

Ergo:

This injunction will not prevent the collection of a tax, but merely the exercise of arbitrary power under a false name.

English lawyers do not inculcate implicit obedience to

statutes which lead to absurd consequences or an infraction of natural law; they hold it inapplicable, and declare the particular case excepted out of the statute, even though the letter of the law be against them.

(Plowden) Dwarris, 484 and 623.

SECTION LXVII.

Section 13, lays a tax on the fermenting capacity, by bushels; Section 20 provides that 45 gallons of mash shall represent not less than a bushel of grain. By an almost extravagant liberality of construction, Section 13 may be construed by Section 20; but there is no provision of the statute, that a bushel of grain shall represent 14 quarts of proof spirits, or any other amount.

Yet, the legislature, by Section 20, declare the relation and proportion of these products to be within the scope of legislation; and, as Congress cannot delegate, to any man, its legislative power, and as it has provided no rule (even though it intended that 14 quarts should represent a bushel), but omitted this essential part from the solemnities of its enactment,—no such rule exists, and no levy, based thereon, is a tax.

Van Horne's Lessees v. *Dorrance*, 2 Dallas, 316.

SECTION LXVIII.

Even if this was a tax,—as the statute does not, in terms, require any person to pay it, but only requires the collector to collect, as in other cases of deficiencies,—it can only be charged on the plaintiff or his property, by an equitable construction, which is contrary to the well established rule of law, that "every statute, derogatory to the "rights of property, or, that takes away the estate of the "citizen, ought to be construed strictly; it should never "have an equitable construction:"

Sharp v. *Spear*, 4 Hill, 84.

Van Horne's Lessees v. *Dorrance*, 2 Dallas, 316.

Dwarris, 646:

—a rule, which has been reiterated in every State in the Union, in tax cases; and, in the 2,400 tax cases, reported, has never been questioned in its application to them.

SECTION LXIX.

The prohibition in question, and the actions of the department, where it was framed, rest upon a false dictum and a false assumption, that the legislature is absolute as to taxation; that taxes can only be imposed on the citizen by his representatives, and his representatives are his only defence: That by them he may be traitorously betrayed and despoiled, and the judicial power of the government made subservient to their will, or so throttled and hampered that it cannot defend him:

That the courts can be made an engine of tyranny, or a cypher, as the representatives may chose.

SEDGWICK, in his treatise on Statute and Constitutional Law, speaks of the power of taxation as, this *tremendous power of eminent domain*, before which every citizen lies prostrate.

And others, with what seems to me equally superficial examination, have spoken of it as a power, against which the only security is, that it is exercised by the people's representatives.

It is true that the cases, in the United States Courts, upon taxation by the United States, are few and far between. The first is *Hylton* v. *U. S.*, 3 Dallas, 171, which decides that, a tax on carriages is not a direct tax, but a duty or impost, and, being uniform, is a valid tax. And, as if to assert the right of the Courts to examine the whole subject, without reference to the fact that these taxes are laid by the representatives of the people,—the Court ignores the matter altogether, examines elaborately the general

subject, and supports the tax in question, on its general equity and uniformity.

The next is that of

Loughborough v. *U. S.*, 5 Wheaton, 317, which decides that the power of taxation by the Government, extends to all places within its dominions, as well to the District of Columbia and the Territories, which are *not represented*, as to the States which are; that *there may be taxation without representation*, but that, if the power is exercised, it must be in accordance with the rules of the Constitution, viz: if direct, in proportion to the census, and if a duty, impost or excise, it must be uniform.

And Chancellor KENT speaks of this paradox that, in the United States, taxation has no connection with representation.

Can it be contended that a citizen of a territory can be arbitrarily subjected to burdens, contrary to the law of nature, tyrannous, and against reason, by a power, in which he is not represented; and that the Courts can be divested of their power to protect those rights, which are absolute, inherent and inalienable—?

And if a citizen of a territory has a right to the protection of the Courts, has not the citizen of the State? There is nothing in these cases, from which the slightest doubt of the citizen's right to protection, against Congress, can be inferred.

If it is true that Congress can enact statutes in defiance of the Constitution, and can divest, or has divested the Courts of power to protect the citizen, then, indeed, we all lie prostrate, not alone before the power of eminent domain, but before a more tremendous power, an absolute and unchecked Assembly.

The limited department has grown absolute, and the absolute department has been destroyed.

Sec. 2, *Dallas*, 308, 310, 316, *A. D.* 1795.

SECTION LXX.

Further, if this could be a tax, it is invalid, for want of uniformity.

The excise on spirits manufactured, is 50 cents per gallon, and four dollars per barrel; and, to be uniform throughout the United States, it must be 50 cents on every gallon and $4.00 on every barrel produced.

Had the plaintiff produced 20 per cent. more than the producing capacity of his distillery, or, had he produced 16 quarts to every bushel of grain, the excision would have been 50 cents and $4.00. He produced about half that amount, and with this deficiency assessed, it makes the tax about 90 cents a gallon and $7.00 per barrel.

It will not do to attempt to evade this inequality, by saying, the State, or the collector, did not know that the amount was not all produced; that the statute fixed the amount on which the tax shall be paid, and, the assessment is based on the statute.

The United States cannot violate the spirit of the Constitution with impunity, any more than the State of New York; and cannot, by fixing arbitrary valuations, nullify the provision of uniformity.

In the "*Bank tax case*," 2 Wallace, 200, New York had fixed an arbitrary value on the property of the Banks, incorporated under State charters, and made them "liable to taxation, equal to the amount of the capital stock, paid in, or secured to be paid in, and their surplus earnings;" and this was held to be a tax on the property of

the Bank; and that, when that property consists of United States Bonds, the law, laying the tax, is void.

Now, this Section requires the assessor to ascertain whether the distiller has accounted for all the spirits produced by him, and provides an arbitrary rule therefor; and if the returns shall be for less than the amount thus ascertained, the distiller shall be assessed 50 cents per gallon and $4.00 per barrel, on such deficiency; but in no case shall the aggregate quantity, assessed, be less than 80 per cent. of the producing capacity.

New York said, we will lay a tax on the valuation, and ignore the property.

This Statute says, we will lay the tax on 80 per cent., and ignore the actual production, if less.

New York's tax was held void, because she could not, by any subterfuge, evade the fact that the property, and not the valuation, was the thing taxed.

And this must, likewise, be overthrown; because no subterfuge can evade the fact, that the whole tax is laid on the spirits produced, and not on arbitrary representation of them.

In the opinion, in the case of *the United States* v. *Singer et Bickerdike*, it is well laid down, that "it is not possible, "even for an Act of Congress, to make a bushel of grain "produce more spirits than nature has supplied, and sci-"ence and skill can extract;" and the conclusion follows, that, more than is produced, cannot be taxed.

SECTION LXXI.

But we deny, that this is a tax. We have already adverted to this position, and now return for a brief elementary discussion:

The word *tax*, in its general sense, includes all contributions, imposed by the Government, upon individuals, for the support of the State, by whatever name known, whether tribute, tithe, talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name.

Story on Const., S. 947.

For the derivation and original use of this word, as used in our law, see Lord Coke's exposition of Stat. 34. Edw. I., entitled: De Tallagio non Concedendo:

"No talliage, or aid, shall be taken or levied by us, or our "heirs in our realm, without the good will or assent of arch- "bishops, bishops, earls, barons, knights, burgesses and oth- "er freemen of the land."

"Tallagium, from the French *tailer*, to share, or cut out "and metophorically, is taken when the King or any other "hath a share or part of the value of any man's goods or "chattels, or a share or part of the annual revenue of his "lands, or puts any charge or burden upon another.

"Tallagium is a general word, and doth include all "taxes." * * *

2 Co. Inst., 532.

Taxes mean pecuniary contribution; performance of bodily labor, on the highway, is not "pay- "ment of taxes."

Overseers of Amenia v. *Overseers of Stanford*, 6 Johns, 93.

The word "Taxes" means burdens or impositions, put or set upon persons or property, for public use.

Matter of the Mayor of New York, 11 Johns 77, p. 80.
Sharp v. *Speir*, 4 Hill, 82.
2 Co. Inst., 532.

It would seem to follow, that any tax, laid on the citizen, without the intervention of property, is a direct tax; and any tax, laid on property or privileges, and required of the citizen only through his ownership or exercise, is an indirect tax.

It would also seem that there must be "subjects of taxation," "sources of revenue," in order that the tax may be taken for the support of the Government.

A poll tax falls directly,—and may only be collected directly of the citizen; but an impost upon land, a duty on imports, or an excise on manufacture, may be charged upon the land, import or manufacture, and the thing may be seized, or so much thereof as may be necessary to satisfy the due proportion, without any reference to the owner; yet, the tax falls indirectly on the owner, whether infant, feme covert, alien or citizen.

And there must be some persons and some things, not sources of revenue, nor subjects of taxation: a helpless idiot cannot be made a subject of direct taxation, nor a babe; yet, either may own property and be indirectly taxed through it; and the tax will depend on the accident of ownership.

Yet, Congress may lay and collect taxes, and make all laws, necessary and proper to do so.

Suppose, ten years ago, it had taxed all persons, black

and white, and had prescribed that all infants who had nothing, should be sold to pay the tax.

The provisions of the amendments to the Constitution, as to due process of law, did not extend to the Blacks, (*Dred Scott* v. *Sandford*, 20 How.). Yet no Judge would have admitted that the infant was taxable, or could be a source of direct revenue.

Nor can a tax be imposed upon a crime; a crime cannot be seized, neither can a tax be made out of it; no one can have a franchise in it, and it can only be remedied by a criminal prosecution.

It would appear, then, that these taxes cannot be laid on the crime of having the deficiency; and they do not purport to be.

But they are laid upon the deficiency, and that deficiency is about 10,000 gallons of spirits, which never existed; and that which never existed, is nothing; and nothing is not a source of revenue. Yet, this tax is either laid on nothing or on the plaintiff.

It must be a direct tax upon him, or must reach him through his property. If not a direct tax upon him, it lacks this essential element of a tax: *a subject of taxation.*

The subject of taxation was analytically discussed by Chief Justice MARSHALL, in delivering the opinion of the Court, in

Gibbons v. *Ogden*, 9 Wheaton, 199,—

in this manner:

"Taxation is the simple operation of taking small por-
"tions from a perpetually accumulating mass, suscepti-
"ble of almost infinite division.

"We are accustomed to see it placed, for different pur-

"poses, in different hands; and a power in one, to take "what is necessary for certain purposes, is not, in its na- "ture, incompatible with a power in another, to take what "is necessary for other purposes.

"Congress may lay and collect taxes, to pay the debts "and provide for the common defence and general welfare "the United States.

"This does not interfere with the power of the States to "tax for the support of their own Governments; nor is the "exercise of that power by the States, an exercise of any "portion of the power that is granted to the United "States." * * *

And, later, principles were laid down by the Supreme Court, in the case of

Dobbins v. *The Comrs. of Erie County*, 16 Peters, 435,

as follows (p. 446): "Married women and children have "privileges and protection, but they are not assessed, un- "less they have goods or property, separate from the heads "of families.

"The necessity for money for the support of States, fixes "the obligation on the citizen to pay taxes,— * * * "and the only sense in which a tax is a personal charge, "is, that it is assessed upon personal estate, and the pro- "fits of labor and industry. It is called a personal charge, "to distinguish it from the tax upon lands and tenements, "which are enforced without any regard to the persons "who are the owners.

"Taxes are never assessed, unless it be a capitation "tax, upon persons as persons,—but on account of their "goods, and the profits made upon their professions, &c.

"They are so imposed, because public revenue can only

" be supplied by assessments upon the goods, *i. e.*, the " estate and effects which every one hath.

" Taxes regard the persons of men, only because of their " goods. The goods, then, are taxed, and not the person. " But those who are to pay, are taxable persons, because " they are under an obligation to contribute, from their " means, to the necessity of the State.

" The obligation, however, only becomes a charge upon " the person, in consequence of the power of the State to " enforce the payment of taxes by coercion. This power " extends to the sequestration of the goods and imprison- " ment of the delinquent.

" A tax, according to the object upon which it is laid, " may be a personal charge; but that is a very different " thing from its becoming a charge upon the person in " consequence of the coercion which may be provided, by " law, to enforce the payment."

(The coercion is, to compel the citizen to separate the tax, which belongs to the State, from the balance of the property, which is his.)

The *Bank Tax case*, 2 Wallace, 200, already cited, and the cases affirming it, in 3rd, 4th, and 5th Wallace, affirm the doctrine that taxes are laid upon persons *or* property; and, if laid upon property, no false name or arbitrary assumption can conceal or alter the actual fund from which the government may compel the owner to separate it, or may itself take it, without reference to him.

This is not a valid tax; and, if not a valid tax, is no tax, for one or more of the foreging reasons, viz:

It is laid, or charged, upon no subject of taxation or source of revenue,—nothing.

As a direct tax, it is not apportioned by the census.

As an excise, it is not uniform.

It is exacted from the citizen, only by intendment and forced construction, and neither are permitted to take away the property of the citizen.

SECTION LXXII.

In this view this statute seems highly penal: If the distiller truthfully returns every gallon he makes, and is guilty of making less than 80 per cent of the capacity of his distillery, or 14 quarts for every bushel, a payment, proportioned to the deficiency is required of him. Because he has not produced the amount, this charge is required. If he had produced it, *it* could have paid the amount. Because he did not produce it, *he* shall pay an equal amount.

This, then, is a retribution, conditioned upon his not producing the amount required.

An as a penalty implies a command or prohibition (Dwarris), the failure to produce, is a violation of the law; and the proper mode of enforcing *its* penalties is, by criminal prosecution.

The word "penal" is defined: That which may be punished; that which inflicts a punishment.—*Bouvier Law Dic.*

And *a penalty* is, a retribution, conditioned upon the doing or not doing of an act, and is inflicted either by virtue of a violated contract or a violated law.

A *crime* is the violation of a law.

And the penalty for violation of law is, therefore, a penalty for crime.

(See Armstrong's Foundry, 6 Wallace, 766.)

SECTION LXXIII.

Congress has no power to require the distiller to produce 14 quarts, or any amount arbitrarily estimated, as the capacity of the distillery.

The authority of Congress to regulate commerce, between the States, and with foreign nations, is exclusive; and the States are without any authority on that subject.

Gibbons v. *Ogden*, 9 Wheaton, 1, pp. 199, 200, and the converse must be true; that the power to regulate the domestic trade and internal policy of a State—a power reserved to the States, and not granted to Congress—, is exclusive in the States; and Congress has no power over it.

And this doctrine is settled by the License Tax cases,

5 Wallace, 470 and 471, and

Pervear v. *The Commonwealth*, ibid., 477.

That this matter of production is within the authority of State regulation, needs little argument: The production of large amounts of spirits from grain, infuses large amounts of fusil oil and other matter deleterious to its quality, and the rapid distillation materially depreciates its value for many purposes. Inspection laws and provisions, on this behalf, are legitimate subjects of State authority.

The hours of labor and the amount of grain, which may be permitted to be used for these purposes, are also within its province; and, in a time of scarcity, I believe there have been instances where the quantity, so used, was limited by State statute; and further, the State might require the distiller, under penalty, to produce a given amount from every bushel.

It is not a case of concurrent jurisdiction,—for both cannot exercise it; and if the power to regulate resides anywhere, it is in the State.

SECTION LXXIV.

Webster defines *an excise* to be, an inland duty, impost or tax, laid upon articles *produced* and consumed :

Also, on licenses to deal in certain commodities.

Burrill Law Dic.
Wharton Law Dic., and
Blackstone and Stephens unite in this definition.

And Webster defines *a tax* to be, a rate or sum of money assessed on the *person* or *property* of a citizen, by government, for the use of the nation or State.

And no amount of search can, in my opinion, find any authority to weaken or vary either of these definitions.

Now, if this is a tax laid upon the *person* of the plaintiff, the Constitution, Art. 1, Sec. 9, 3, strikes directly at its root : " No capitation, or other direct tax, shall be laid " unless in proportion to the census ;"—and this is in proportion to deficiency.

It is not laid upon property, for that never existed.

It cannot be an excise or impost, for they are only laid on things produced,—and this was not produced.

Nor is it a duty ; for, that is laid only on imports and exports.

If a tax is laid, it is laid on the plaintiff ; and that is a direct tax.

But is it a tax ?

" A rose would smell as sweet by any other name," and

a tax, possessing all the inherent qualities of a tax, could be collected as a tax, by whatever name it is called.

Therefore, we will present parallel enactments:

Every distiller, who shall fail to produce 14 quarts of spirits from each bushel of grain, shall forfeit and pay to the United States, 50 cents per gallon upon the amount of such deficiency.

Every distiller, who shall fail to produce 80 per cent. of the producing capacity of his distillery, shall be fined 50 cents per gallon, for every gallon of such deficiency; and all such fines and forfeitures shall be assessed by the assessor of the district wherein such distiller resides, and shall be collected by the collector, by distraint, or otherwise, as the necessities of the case may require.

Every distiller, who shall fail to produce 80 per cent. of the capacity of his distillery, shall pay, to the United States, the sum of $1,000; and, at the expiration of each month, the assessor shall ascertain the producing capacity of the several distilleries within his district, and shall enquire and determine, whether or no, the several owners thereof have produced 80 per cent. of such producing capacity, and shall issue a warrant to the marshal or collector of such district, against any distiller whom he may find delinquent, commanding him to make, levy and collect the sum of $1,000 by distress of goods, imprisonment of body, &c.

Every distiller, who shall fail to produce 80 per cent. of the capacity of his distillery, shall pay, to the United States, the sum of $1,000; and all grand juries shall enquire thereof, and courts shall try all indictments found

therefor, and shall pronounce sentence, and issue execution therefor.

These, all, have the same characteristics; and the characteristics determine the name they ought to bear, and the proper mode of collection.

The name of *penalty* covers every quality; the inquiry by the grand jury is the only one which appears clearly proper; and, if the action of the criminal court is proper, no other tribunal has jurisdiction.

SECTION LXXV.

Upon the argument of the cases of

The United States v. *Singer & Bickerdike*,
The United States v. *Furlony*,
The United States v. *Van Buskirk*,
The United States v. *Hollihan*,
The United States v. *Park*,

the Court propounded the following quere?

Can the legislature say to distillers: We lay a tax on what you produce. It is difficult to find how much you really produce; therefore, our agents shall, from time to time, estimate how much you can produce, and you shall produce and pay the tax on 80 per cent. of these amounts, or stop—?

To which I answered: 1st. It cannot;

2nd. It has not;

and, on the first answer, said:

It is adjudged (*Bank of Commerce* v. *New York City*, 2 Black., p. 634 and 635, affirming the doctrine of *McCullough* v. *The State of Maryland*) that—delicate as is the dividing line between State and national authority to regulate business—it is ascertained by the extent of sovereignty, and that, when the limit is ascertained and fixed, all perplexity and confusion disappear. "Each is sovereign in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised."

It is further adjudged (*Pacific Ins. Co.* v. *Soule*, 7 Wal-

lace, p. 444), "that the national Government, though su- "preme within its sphere, is one of limited jurisdiction and "specific functions. It has no faculties but such as the "Constitution has given it, either expressly or incidentally, "by necessary intendment. Whenever any act, done un- "der its authority, is challenged, the proper sanction must "be found in its charter, or, the act is *ultra vires* and *void.* The test must be applied in the examination of the question before us.

Congress has power to regulate commerce between the States, and with foreign nations, and the States have no authority over it, whatever; "but over the internal "commerce or domestic trade of the States, Congress has "no power of regulation or direct control" (License Tax cases, 5 Wallace, 470); "this power of regulation is ex- "clusive in the State."

The right of taxation in Congress, is not inconsistent with the right of the State to regulate; but Congress must lay its tax on existing subjects. It cannot call them into existence in order to tax them. (Ibid., p. 471.)

All this has been adjudged in terms; and it follows that, as Congress has no power of regulation, or direct control, every regulation must be such as is strictly incidental to taxation,—and so it is also adjudged.

And it follows that the question, *whether the tax can be laid on the basis, named* in the quere, is the only one before us.

We have proved by arguments, which have not been attempted to be met, that the tax must be laid on something; and the Supreme Court have affirmed as a fundamental rule, that the tax must be laid on existing things. (5 Wallace, 471.)

To support an affirmative answer to the quere, the estimate of 80 per cent., under the rules fixed by Congress, must be *conclusive evidence* of the amount produced; for, if not conclusive evidence of the fact, the real facts would have to be examined, and the excise laid in accordance with them, to be "uniform;" and if not uniform, it would be void, in toto.

And the question resolves itself into this:

Can Congress fix an arbitrary rule, of conclusive evidence, as to the amount produced? The answer is negative.

1st. The Legislature may require a judicial tribunal to receive evidence, excluded before; may require the hearing of matters as evidence, which were not evidence before. But it cannot weigh evidence, and decide what a jury or a court shall believe, where evidence is conflicting. This is an attribute of judgment, a judicial act; yet, this is just what the legislature would do, by prescribing *conclusive evidence.*

In the case at bar, it is admitted, that the amounts reported are all that the party has produced; if put in issue, it would have been proven beyond the possibility of a doubt. Yet, the estimate of 80 per cent. of capacity, if conclusive evidence would require court and jury to return, as their verdict and judgment, that which had been proven, beyond the possibility of a doubt, to be false;—and the trial would, in fact, be not by court or jury, but by the Legislature, and that, without hearing or evidence.

2d. The practical result of such an arbitrary rule is, to place the Constitution in the power of Congress.

For, if Congress can suppress the real facts, and make

its edict conclusive evidence that false bases of taxation are true, it may ignore real uniformity altogether.

Only the Courts can construe statutes: the judicial department alone can decide whether the fundamental Statute, commanding uniformity, has been violated; and the Legislature cannot wrest the decision, directly or indirectly. The whole judicial power of the United States is vested in the Courts; and no power to control their judgment, directly or indirectly, was ever given to Congress.

The distillers might answer the legislature:

"You lay a tax on what we produce. We report what we produce, and pay your tax. You say we lie, and, it is difficult to find what we produce:—the issue is fairly joined; and the presumption is, that we are not guilty. You are a party, and cannot be a judge in the cause. Submit the cause to the courts, or to assessors, chosen so as to be unbiased, and sworn to try the issue and a true verdict give, according to the facts. There is some difficulty in this; and the Court or assessor, unbiassed by arbitrary instructions, may find the facts against you; yet, the difficulty is only such as is necessary to the protection of the rights of freemen.

In our quere, Congress says to the distillers: "*You must produce, and pay the tax on*, 80 *per cent., or stop.*"

It cannot regulate or directly control them, and can only stop them for a failure to pay the tax, or do their duty under the law.

It is not their duty to pay the tax on 80 per cent. unless they produce it, for that would not be uniform excision; therefore, it is necessary that Congress require them to

produce that amount, if it requires them, under penalty, to pay it. "*You must produce*," is no less than regulation and direct control, which is beyond the power of Congress. (5 Wallace, 470.)

It is bringing a thing into existence, in order to tax it, and contravenes the principle laid down, "Congress must lay the tax on existing things." * * * * "It cannot "bring a thing into existence, in order to tax it. If Con- "gress had the right to regulate, it might regulate by "licenses, or any other way, as well." (5 Wallace, 470.) If it had the power to call the subject into existence, the tax might be a royalty, or bonus, and not a tax; and no uniformity would be necessary; but,—we have seen that it has no such rights.

Then, the only manner in which the quere could be answered in the affirmative, would be, by saying that, as Congress had imposed the rule, any one who runs his distillery, started it with his eyes open, *cum onere*; and if he will not bear the burden, he may stop.

1st. This contravenes the right of every man to acquire, possess and enjoy property.

To acquire: by all lawful trades and vocations, which he may exercise, as parcel of the common liberty of every man, subject only to such regulation as is exclusively within the authority of the State Government.

To possess and enjoy: in using it to acquire other property,—for experiments,—in running one day, and stopping the next, and producing from it such results as of his own free will he may determine:—this is free enjoyment.

2d. The effect of this *cum onere*, appears first in these cases: Each distiller had acquired and possessed his respective distillery, before the passage of this Act; and

it is now proposed to forbid the enjoyment of their property, except *cum onere:* with the burden of a regulation by Congress, which, it had been adjudged (ante), Congress cannot make.

If we admit—what was not the fact—that these distillers were not enjoying their property, in using it in pursuing their lawful trade within this State, at the time of the passage of the Act, but were sitting idly, and only started after obtaining the license and voluntarily placing themselves under the control of the Act (a proposition false in every particular), we should have an instance parallel to any other divestiture of liberty by Congress, and a subsequent assumption of the maimed franchises *cum onere*, or of any other instance of a citizen releasing his individual absolute rights to Congress, by implied contract.

Thus, if a citizen,—being abroad, having learned that Congress had abolished the trial by jury, on account of the difficulty attending the trials, and the uncertainty of their results,—should return, he would come *cum onere*, and the statute would be valid as to him, because he voluntarily entered its domain.

Or, better still: The citizen at home begets a child, *cum onere*, and posterity is deprived of constitutional liberty by an implied contract.

Or, better still: should Congress enact that every person, who shall hereafter purchase land from the United States, and settle thereon, shall be debarred from the trial by jury for crimes against the United States—would any man buy *cum onere?*—Most certainly not.

The Government was established to preserve the blessings of liberty to the people and their posterity. No individual can contract away his inalienable rights; and no

authority was ever delegated to Congress, or any department of Government, to become a party to such a contract; therefore, the contract must fall for want of parties.

1. We have seen, by the License Tax cases, 5 Wallace 470, and Pervear v. The Commonwealth, ibid. 477, that the imposition of a license tax and the issue of a license by the United States, does not, and cannot authorize a business, forbidden by a State, or, under State regulation required to be exercised in a particular manner and under certain regulations, only; that the taxation is the simple operation of taking a certain share from the profits of the business, if exercised, but does not imply authority in the general Government to supersede, in any manner, the complete authority of the State over the business, exercised within it.

2. We have also seen, in the Bank Tax case, 2 Wallace, 200, and the other authorities, cited in argument, that taxes are laid upon persons or property; and, if laid upon property not taxable, or upon a valuation or estimate, made to evade or remove the difficulty in finding the actual property, which must, in fact, bear the burden,—such levy and such attempts to remove the difficulty, must be futile, and the levy must be void;—that the property itself is the thing that must be reached, and, if not taxable, the arbitrary valuation cannot evade or remove the difficulty, and make it so.

Now, what difference does it make, if, when we go behind the arbitrary valuation, we find United States bonds (which are for purposes of taxation, nothing) or (literally) nothing? The subterfuge of arbitrary valuation cannot make the bonds, which are nothing taxable into something taxable; nor can it make nothing at all, into something.

But this Bank Tax case is still nearer ours: In going behind the arbitrary valuation, it was found to represent and be composed of some property, which was taxable, and some United States Bonds, which were not taxable. And we, going behind the subterfuge, by which it is attempted to evade the difficulty, find some spirits produced, which are taxable, and some non-existent, which are not taxable.

The Supreme Court held that the subterfuge could not fasten the tax on the untaxable bonds, and as to them the statute was void; or, that the State could not compel the owner to pay a sum equal to the tax on the taxable and untaxable property, by any name.

And the principle covers our case, and takes the untaxable non-existent articles out of the operation of the statute, and makes the statute, requiring the distiller to pay the amount, void.

The query is answered;—Congress *can not.*

To make assurance doubly sure, we show that Congress *has not:*

Sec. 1. Requires the distiller to pay 50 cents per gallon, on every gallon "produced." Nothing in the Section goes beyond the actual production.

SEC. 59. Requires the payment of $4 for each "barrel produced," and says nothing about any other.

SEC. 13. Lays a daily tax upon the capacity, of 10 cents a bushel, that is, 10 cents on every 45 gallons of fermenting tubs.

All these provisions tax existing things.

SEC. 20. Is the one that attempts to tax the deficiency which does not exist; but it does not succeed. The District Attorney expressly disclaimed all argument, and told us there was a hiatus, a chasm, between the 45 gallons of beer and the spirits. The Legislature have left out some words; the Court cannot supply them. (Dwarris 578 & 598).

The hiatus is evident: The Assessor is commanded to ascertain whether the distiller has accounted for all the spirits produced by him; and, to determine the amount, the quantity of the materials used, shall be ascertained, and 45 gallons of beer shall represent a bushel of grain! That is as far as the Section goes. There is a whole Section left out; the chasm is apparent, and it is absurd to try to connect together two clauses of a statute that evidently refer to different things.

The Assessor is directed to ascertain the materials used; 45 gallons of beer to represent a bushel of grain. The next words are: "In case the return of the distiller shall "have been for less than the quantity thus ascertained." Construe the parts together, and it reads: "In case the "returns (of materials used in the preceeding month, made "under Section 19) shall be less than the quantity (of mate-"rials) thus ascertained (by estimating 45 gallons of beer "as a bushel) the distiller shall be assessed for such defi-"ciency, at the rate of 50 cents for every proof gallon."

Now, as the deficiency is in the materials, i. e., grain used, it is evident that this tax is to be assessed, 50 cents on each proof gallon of the grain used.

A proof gallon is not defined in this Act; though, as proof spirits is, we may suppose, that a proof gallon means a gallon of proof spirits, but do not know; and this Section, if to be construed together, clearly refers it to grain.

The next clause involves us in hopeless absurdity; and, unless we can fill the hiatus and tell how much spirits Congress intended should represent a bushel of grain, we can but guess at its intention.

The statute nowhere states what amount of proof spirits shall represent a bushel, and we have no hint even at the intention.

The Commissioner has assumed 14 quarts as the representative, in estimating the producing capacity; but it is evident that 14 quarts was not intended to be interpolated in this hiatus; for, the Assessor is only required to bring the estimate up to 80 per cent. of the producing capacity. Thus, if the fermenting capacity is 100 bushels per day, the producing capacity is 1400 quarts per day, and 80 per cent. of this is 1120 quarts per day; and it would seem that Congress intended that a bushel of grain should represent not less than 11.20 quarts of proof spirits.

Further, the break is so short, and the commencement so abrupt, that we have no right to assume that Congress intended to do as the Commissioner supposes. It would be equitable, and in accordance with sound justice, for Congress to supply a rule for estimating the true producing capacity of the distillery, from the grain actually used, viz: the amount of spirits which the distillery was capable of producing from the materials actually used, considering

all the favorable and unfavorable circumstances which surrounded it.

And this seems to have been the intention ; for there is no requirement that he shall refer to the abstract survey, but to the materials actually used.

In making the estimate,—the notice of the distiller,—the abstract producing capacity, ascertained by the surveys,—the books of the storekeeper, and other matters furnished by the statute, would be of great assistance : And from all these aids the assessor might estimate what, under all the circumstances, the distillery might be fairly expected to have produced. He shall then form his judgment of how much it did produce, and assess the deficiency. But the last clause of the Section provides that, as the assessor may be inclined to indulge his doubts, and lean towards lenity (?) too much, he shall not allow them to carry him more than 20 per cent below the amount he has estimated as fairly to be expected from the grain actually used, and the circumstances surrounding the particular case.

This supposed Section would make the statute, in this particular, clearly constitutional, just and reasonable, careful of the citizens rights, yet, obtaining the entire due of the government.

And, as we must construe statutes, where the words will permit, in harmony with the Constitution, justice and reason, we must certainly suppose the Legislature intended to fill the chasm with a provision, which would make the statute constitutional, reasonable and just. What the provision would be like, we may suppose. What it would have been, we do not know. Therefore, the matters, which were evidently intended to hang upon it, must fall ; and Section 20 is void, for uncertainty.

SECTION LXXVI.

Recapitulation.

In this argument we have scouted the construction (read on the argument), put by the Commissioner on Section 4: That, because the disagreement of the Courts in different parts of the country, as to the proper construction of the Acts, frustrated the uniform enforcement of them, therefore Congress intended to enable the *Internal Revenue office* to control the construction.

Congress never intended to divest the Supreme Court of the authority to adopt the true rule. That Court is always open to the appeal of the United States, and Congress never intended to transfer its functions and judicial authority to a subordinate executive officer. There would be no excuse, not even that of urgency; for, Congress could have required the Court to give precedence in such matters, above all others, and thus have secured a decision as early, at least, as the *Internal Revenue office* gives it.

The District Attorney, in argument, agreed in this view; and I would pass it, but that another step is taken by the department, on the assumption that it has the judicial right to determine the true construction of the Act. This is found in the following printed slip:

"To Distillers."

"A case of considerable importance to distillers has just "been decided at the Bureau of Internal Revenue. W. "O. Watts appeared for certain Western distillers to claim "abatement of deficiency tax, levied because the distillery "did not produce eighty per cent of its surveyed capacity.

" It was proved to the satisfaction of the department, that " the owners had acted in good faith, and had worked as " many days as possible under the circumstances.

" The decision was, that, every effort having been made " to comply with the law,—while under the ruling and " practice of the department it did not furnish ground for " abatement,—it formed a basis for asking a compromise; " and under this a compromise was effected, reducing the " payment to $18,000, and the dismissal of a suit for re- " covery, already instituted."

Congress may lay taxes, subject to two unbending conditions: Direct taxes must be proportioned to the census; excises &c., must be uniform.

This judicial authority decides what is the law; and then, as an executive officer, proceeds, not to execute it, but to compromise, or sell immunity.

It decides what is uniform taxation, and then proceeds, deliberately, to destroy the uniformity, by accepting less.

The position is monstrous. If the defendants are bound to pay, every man is bound to pay, by the same rule; and the Commissioner may not enforce a suit against them for the whole amount, and sell out to others, according to such rules or caprices as may, at the time, please him.

We scout the proposition, but use the instance to show, that even the Executive believed, with us, that Congress did not intend to make an unvariable rule, that a distiller, who had paid on all he had produced, should pay on the arbitrary amount which the Commissioner has fixed.

In the argument we have shown that, by well established rules of construction, our case is excepted out of the statute, whatever meaning its language may appear, at first, to convey.

That, by equally well established rules, all ambiguities must be construed in favor of the citizen; and that the ambiguities are many.

That the construction must be strict against the United States,—liberal in favor of the citizen;—that the intention of Congress must be taken most strongly against itself, and in favor of the citizen; for, Congress is ever at hand to make its intentions clear, while the citizen has no remedy.

That, by the Constitution, if Congress has commanded, the *sic jubeo* is void; and on this, also, the decision must be in strictness against Congress, equitably for the citizen.

This branch includes: the collision of authority between State and National legislation,—the construction of the grant to Congress,—the question, whether this is penal; and also the point, that the rule, established here and now, will be the rule for this Court hereafter. And the rule, as to what is conclusive evidence of the amount produced, runs through, not only suits in debt, but suits for forfeitures and criminal proceedings.

In all cases where the amount is less than $2,000, and all criminal proceedings, this is *the highest judicial tribunal* in the land. And your Honor's decision is beyond the review of any tribunal, in any event.

With the dignity and great power are coupled, also, the heavy responsibility of protecting the citizen. It can no longer be said that a "District Judge" places himself in antagonism with Congress; but, that the Court of last resort—the tribunal, designated by Congress for that purpose, has accepted the responsibility with the honors,—has pursued the invariable rule that *the law favors liberty* (Dwarris, 674),—has obeyed and been bound by the supreme law of the land, and has not dared to withdraw its august power from the protection of the citizen and the fundamental law.

SECTION LXXVII.

THE THREE CO-ORDINATE DEPARTMENTS—THE JUDICIAL PROVINCE IN SUCH CASES.

The principle is well settled, that, in this country, the three departments of government are co-ordinate; each derives its authority from the Constitution, and for its acts within the powers delegated by the Constitution, it is answerable to the people, and to them alone. (2 Dal., 308-9; 3 Dal., 399, and cases, cited ante.)

Wherever discretion is committed by the Constitution, to any department or officer, things done in the exercise of that discretion, are only politically examinable. (1 Cranch, 170.)

But this is as far as the principle extends, and its statement implies the postulate, that acts done, without the powers delegated, are examinable in another forum.

It is upon precisely this distinction that Courts constantly act in regard to legislative acts. If the act is within the discretion, delegated to the legislative department, the Courts have nothing to do but to expound it, and give it effect; but, if it is not within the discretion delegated, they declare it void,—not *ex cathedra*, or by an imperial *rescript*, but, only in the sphere of their duty, when, in administering justice distributive, the individual, wronged by the execution or existence of the act, prays the remedy. (And this is the very reason why the Courts do not raise constitutional questions. It is only when the parties claim that they are wronged by the statute, that the Courts are called upon to examine the complaint.)

It is the duty of the executive officers to execute the laws. So long as that department continues within the limit, it can commit no injury.

If, however, a specific duty is assigned by law, and the officer, under color of that duty, does another act, not assigned, he and his act are not protected by his office. (1 Cr., 170.) So, if he attempts to execute an unconstitutional law, or one in part unconstitutional, *it is clear that the questions are not politically examinable, because the right to question whether it is politic, or not, to disobey the Constitution, is inconsistent with the existence of the Constitution itself. And, the question not being one of policy, or of discretion, if any person's rights are invaded by the act, it is within the judicial power of the Government to take cognizance of his complaint*, and, deciding what is the law, and that the injurious act is not warranted by law, to forbid it, and give a remedy to the injured party.

The statute being decided unconstitutional and void, and the act without the powers, committed by the Constitution to the Government, it is no longer an act of Government; and as the Court has jurisdiction of the private individual who is doing the act, it proceeds with a complete remedy against him.

SECTION LXXVIII.

But it is said that *the Government* has concluded that it cannot permit itself to be interfered with in the collection of its revenues; that private right must give way to it, and cannot be noticed.

The inaccuracy of the expressions used, first strikes us: "*The Government has concluded;*"—Who is the Government?—The Executive?—it will not for an instant be claimed that he is the Government of the United States.

The legislative department?—hardly; for in it the whole legislative power, even, was not vested (2 Dal., 411), and no powers, not legislative, were given; yet, such powers are absolutely necessary to Government.

The Judicial department has always denied that it was the Government.

As neither department constitutes the Government, the next inquiry is: Do the three, together, constitute the Government?

No legislative powers were granted to the executive or judicial, and but part only, of the legislative power of the United States was vested in the legislative department; therefore, these three departments do not constitute the Government.

Those powers, not vested, reside in another law maker.

But, what is that law maker?

A department?—no.

The subordinate of a department?—no.

What law has it enacted?—the Constitution.

What laws can it enact?—Constitutions.

It made, and can unmake, the three departments. It gave them power: "The powers hereby granted, shall "be vested."

It controls their power:—"No bill of attainder shall be "passed; nor shall private property be taken for public "use, without just compensation." It can take away their power, and abrogate their acts.

They are subjects, then; and this is the sovereign.

The people are the Government. "The sovereign, "when traced to his source, must be found in the man." (2 Dal., 458.)

The next inaccuracy in the statement, is in the words: *its revenues.* "The Government has concluded it cannot be interfered with in the collection of *its revenues.*"

The precise reason why the remedy is asked, is, that this property does not belong to "*its revenues.*"

The people never gave it.

The sovereign never authorized the legislature or executive to take it.

They have no title, whatever, to it, but the bare legislative fiat.

And the motto, under which it proceeds, reads: What Congress pleases, has the force of law.

This sounds, as if our system, (in the language of Chancellor Kent, 1 Com., 342), "is *disgraced* by such a "slavish political maxim, as that with which the Institutes "of Justinian are introduced?"

"Quod principi placuit, legis habet vigorem."

Inst. 1, 2, 6.

Followed to its necessary result, this statement, if of any force at all, shows that the Government of the United States is a despotic Government. (2 Dallas, 461, 462.)

There is a concentration of the powers of government in a single branch of it, which, whatever be the form of the Constitution, will be a despotism,—a government of unlimited, irresponsible and arbitrary rule.

This usurpation of power, never granted to any department; this attempt to give the force of law to the bare fiat, and to compel co-ordinate departments, silently or actively, to acquiesce in the violation of the Constitution, is not less an usurpation, than the assumption of some power that had been delegated to another department, would have been. The principles which apply to the latter case, control also the former, and they are laid down concisely, and with reasons, easier to out-vote than to answer, in *Du Chastellux* v. *Fairchild*, 15 Pa., 18. p. 20. The opinion of the Court was delivered, July 15, 1850, by Gibson, C. J.

"If any thing is self-evident, in the structure of our "Government, it is that the legislature has no power to "order a new trial, or to direct the Courts to order it, "either before or after judgment. The power to order "new trials is judicial; but the power of the legislature, "*is not judicial. It is limited to the making of laws;* not "to the exposition or execution of them. The functions "of the several parts of the Government, *are thoroughly* "*separated, and distinctly assigned to the principal* "*branches of it: the legislature, the executive, and the ju-*"*diciary, which, within their respective departments, are* "*equal and co-ordinate.* Each derives its authority, me-"diately, or immediately, from the people; and each is "responsible, mediately, or immediately, to the people, for "the exercise of it. When either shall have usurped the "powers of one or both of its fellows, *then, will have been* "*effected a revolution, not in the form of the Government,*

" *but in its action. Then will there be a concentration of*
" *the powers of the Government, in a single branch of it,*
" *which, whatever may be the form of the constitution, will be*
" *a despotism,—a government of unlimited, irresponsible, and*
" *arbitrary rule. It is idle to say that the authority of each*
" *branch is defined and limited in the constitution, if there*
" *be not an* INDEPENDENT POWER, *able and willing to enforce*
" *the limitations. Experience proves that it is thoughtlessly*
" *and habitually violated; and the sacrifice of individnal*
" *right is too remotely connected with the objects and con-*
" *tests of the masses, to attract their attention.*"

From its every position, it is apparent that the " *conserv-*
' *ative power is lodged with the judciary,* which, in the ex-
" ercise of its undoubted right, *is bound to meet every emer-*
" *gency.*"

SECTION LXXIX.

But it is said that "all taxation is tyrannous, taking a "man's property without his consent; and therefore, as "taxation is lawful, all tyrannies under that name, must "receive the acquiescence, and perhaps the assistance of "the courts."

What is taxation?—In a free or just government it is, taking from each person his due and just share of the expenses of the State, which he, by becoming a member of society, tacitly agreed to contribute, in consideration of the advantages which he receives from society.

Rutherforth's Inst., B. 2., C. 3, 5, p. 272.

In the United States, the rule of proportion is fixed according to the rule of Natural law; this rule, being so fixed, if the tribute is not so taken, it is not a tax, but an arbitrary payment exacted without law.

Ibid., 273.

Is the power of taxation unlimited?—No; for, by the Constitution it is circumscribed with rules.

Is it irresponsible?—No; for the fundamental law commands the manner of its exercise; and to that law it must answer.

Is it arbitrary?—No; for it can be exerted, no otherwise than according to the rules of the Constitution.

It has not in it a single element of tyranny.

Its abuse alone is tyrannous.

In the statement, we have been considering, the conclusion drawn from the premises, is not less false than the premises themselves.

It has been the obsequious maxim of those who have made themselves the tools of tyrants, but has no warrant in the spirit of our institutions, or those from whence our own were derived.

The fact that large powers, liable to be abused, were exerted, has furnished a sufficient rule for close scrutiny.—Bracton, Coke, Holt, Denman, and even Lord Mansfield have won respect, approval, and eternal gratitude, by throwing the whole power of the law against the extension of arbitrary power; and Blackstone's apostacy does not change the common law, as we received it.

His Commentaries were written less than twenty years before the revolution. And the manner in which his heresy was denounced, as well as the principles of government and the powers, and duties of the Courts, sanctioned and understood by the framers of the Constitution, were stated by the Supreme Court,—through one who was just fresh from the Convention that framed the Constitution itself,—in the case of *Chisholm* v. *Georgia*, 2 Dallas, 419.

At page 458, the Court, having considered the feudal system, proceeds: "Into England this system was introduced by the Conqueror; and to this era we may probably refer the English maxim, that the King is the Sovereign, and fountain of Justice. But in case of the King, the sovereignty had a double operation: While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction."

This reason shows the jurisdiction of the People's Courts over the legislative Acts, and the executive pursuing them; for, there is a power superior to both, and a

superior law, whose enforcement is lodged in the conservative department of Government.

The opinion proceeds: "'The law,' says Sir William "Blackstone (1 Com., 241, 242,) 'ascribes to the King "'the attribute of sovereignty: he is sovereign and inde-"'pendent within his own dominions; and owes no kind "'of subjection to any other potentate upon earth. Hence "'it is, that no suit or action can be brought against the "'King, even in civil matters; because no court can have "'jurisdiction over him; for all jurisdiction implies "'superiority of power.

"This last position is only a branch of a much more ex-"tensive principle, *on which a plan of systematic despotism* "*has been lately formed in England, and prosecuted with* "*unwearied assiduity and care.* Of this plan the author "of the Commentaries was, if not the introducer, at least "the great supporter. He has been followed in it by "writers, later and less known; and his doctrines have, "both on the other and this side of the Atlantic, been im-"plicitly and generally received by those, *who neither ex-*"*amined their principles nor their consequences.*"

This systematic despotism, so formed in England, the Colonies rebelled against; and the result was revolution, and the Constitution, thus expounded.

The Court proceeds (p. 460):

"In England, according to Sir William Blackstone, no "suit can be brought against the King, even in civil mat-"ters. *So, in that Kingdom, is the law at this time recei-*"*ved.* But it was not always so. Under the Saxon Gov-"ernment a very different doctrine was held to be ortho-"dox. Under that Government—as we are informed by

" the Mirror of Justice, a book, said by Sir Edward COKE,
" to have been written, in part at least, before the Con-
" quest;—under that Government it was ordained, that
" the King's Court should be open to all plaintiffs, by
" which, without delay, they should have remedial writs, as
" well against the King or against the Queen, as against
" any other of the people. (4 C. A. N., 487.)

" The law continued to be the same for some centuries
" after the Conquest. Until the time of Edward I., the
" King might have been sued as a common person. The
" form of the process was even imperative: '*Præcipe Hen-*
" '*rico, Regi Anglico*,' &c.: 'Command Henry King of
" 'England.'" &c.,

(Brac., 107; Com., 104.)

" Bracton, who wrote in the time of Henry III, uses
" these very remarkable expressions concerning the King:
" '*in justitia recipienda minimo de regno suo comparetur*';
" in receiving justice, he should be placed on a level with
" the meanest person in the Kingdom.' (Com., 104.)

" True it is that *now*, in England, the King must be
" sued in his Court by *Petition*; but, even now the differ-
" ence is only in the form, not in the thing. The judgments
" or decrees of those Courts will substantially be the same
" upon a *precatory* as upon a *mandatory* process. 'In the
" Courts of Justice,' says the very able author of the con-
" siderations on the laws of forfeiture, 'the King enjoys
" many privileges; yet, not to deter the subject from con-
" tending with him freely.' (G. F., 124.)

" The Judge of the High Court of Admirality in Eng-
" land, made, in a very late cause, the following manly
" and independent declaration: 'In any case, where the
" 'Crown is a party, it is to be observed, that the Crown

" ' can no more withhold evidence of documents in his
" ' possession, than a private person. If the Court thinks
" ' proper to *order* the production of any public instrument,
" ' that order *must* be *obeyed*. It wants no *insignia* of an
" ' authority derived from the Crown.'

(Col. Jur., 68.)

" ' Judges ought to know that the poorest peasant is a
" ' man, as well as the King himself: all men ought to
" ' obtain justice, since, in the estimation of justice, all men
" ' are equal, whether the Prince complain of a peasant, or
" ' a peasant complain of the Prince.'

(War. 343.)

" These are the words of *a King*;—of the late Frederick
" of Prussia. In his Courts of Justice, that great man
" stood upon his native greatness; and disdained to mount
" upon the artificial stilts of sovereignty."

Turn where we will, no precedents for tyranny can be found in the utterances of wisdom.

Servile cowardice, indolence, imbecility, selfishness, corruption, and usurpation, have all, always covered these irregular courses with the names: State necessity, State dignity, mighty importance, and the impossibility of considering such small matters as individual rights. But greatness, honor, wisdom, have never so spoken; such things have never by them been done, save in the heat of rebellion, or the throes of war, when the nation's muscles were all strained and its powers taxed to their utmost; —Then, and only then, can they be justified;—State necessity and People's liberty forbid!

In the cases at bar there is not even the *prima facie* right. The assessments which are copied in the Bills show

the nature of the claim. And the sworn Bills demanding answers under oath not only defeat the presumption of regularity, but present evidence which unanswered is conclusive that the imposition is forbidden by the Constitution.

I will not answer the quibbles on the meaning of the word "tax" as found in the statute, the case too broad; the claim is that the end of the Constitution shall be realized, and that CONSTITUTION,—"the Judges are bound on "oath or affirmation to support." (2 Dal. 409.)

SECTION LXXX.

In concluding this branch of the argument, caution perhaps excessive—lest the position should be misunderstood, and the divisions between *irregularities* and *illegalities* be confounded—prompts me to define the boundary and with it, the line between those cases wherein Chancery will interfere, and those, in which it cannot be called to exercise its powers:

The *illegality* of a tax, must consist in the fact that it violates some controlling law;—its *irregularity* need not consist in the violation of any law.

It may consist in the slightest technical variation from common practice, or from the directory parts of a statute;—or it may be of greater magnitude; and in some cases great doubts, as to the effect of the irregularity, must exist;—or it may be of so gross a character, as to make the whole proceeding clearly illegal.

If a tax is irregular, merely, and the Government has acquired, and retains a present right to the tax, and there is a corresponding obligation on the citizen to pay it—a Court of Equity cannot interfere, but will leave the party to his remedy against the officer, who committed the error, for any damage resulting from his irregular act.

But, if the irregularity consists in the failure to do some act, which the law makes a condition precedent, to the right of the Government to the tax, so that the Government has no right, and the citizen is under no obligation to surrender his property,—it is unlawful to take it without right,—and Chancery will interfere.

Where, as in the cases at bar—an illegality, consisting of a direct violation of the Constitution, is presented,—no doubt or difficulty can exist. In cases of irregularities, however, it will be, as it has been in State taxation,—upon which a very learned Judge once said: A case upon the validity of a tax, is often one of extreme difficulty: The necessities of the State, on the one hand, which have caused it to hold out extraordinary inducements to purchasers to invest their money, and, on the other, the right of the individual to be protected in his property, from the illegal action of the State, present opposing rights and equities, which deserve the most careful consideration. The principles, which govern, must be patiently sought out and clearly ascertained, and then, applied with care. And the very difficulties which surround the subject, furnish the strongest reasons for most careful consideration of the subject, lest, by ill-considered action, gross and irreparable wrong be done by the department, organized to give a remedy for every wrong.

The distinction is, that, where the State has the present right to the tax, Chancery will not interfere to prevent the collection, however irregular the preliminary proceedings may have been; but, where it has not the right, the taking is illegal, and Chancery will prevent an injury, for which there would be no prompt, adequate and complete redress *by suit or action at law.* And, as the State cannot be sued, it will always interfere, to prevent the transfer to the State, of the specific article, which specific article, being so transferred, will be placed beyond the reach of a suit, or action at law.

Osborn v. *U. S. Bank*, 9 Wheat.

Mott v. *Pennsylvania R. R.*, 30 Penn., 9.

Ottawa v. *Walker*, 21 Ill., 605.
Morris, etc., v. *Jersey, etc.*, 1 Beasl., 227.
BURNETT v. CINCINNATI, 3 Ham., (Ohio) 73. (*See especially* pp. 87 and 88.
Culbertson v. *Cincinnati*, 16 Ohio, 574.
VANOVER v. DAVIS, 27 Geo., 354.
Fremont v. *Boling*, 11 Cal., 380.
MILLER v. GROMAN, 38 Penn., 309, p. 311.
MATTHENY v. GOLDEN, 5 Ohio St., 361.

(These authorities apply to the whole of this section and those printed in small capitals seem to support the whole case, most clearly; therefore I ask especial examination of them.)

This mode of application for relief, sanctioned—as we have seen—in the case of the *United States Bank* v. *Osborn* (9 Wheaton), is the logical sequence of this principle of all good governments.

"The prerogative of the Crown" (or Government) "extends not to do any injury; for, being created for the "benefit of the people, it cannot be exerted to their prejudice." (Plowden, 437.)

"A wrong is not chargeable, personally, on the King" (or Government), "nor is he, *but his ministers*, accountable to the people."

3 Bl. Comm. 254.

In doing this wrong, these ministers are without the sanction of the prerogative of Government; and their wrong, under color of that right, should be stayed.

SECTION LXXXI.

THE OBJECT OF THE CONSTITUTION

was, to form a more perfect union, establish justice, insure domestic tranquility provide for the common defence, promote the general welfare, and secure the blessings of liberty to the people and their posterity.

Chisholm v. *Georgia*, cited Sec. 50, ante.

Rhode Island v. *Massachusetts*, cited p. 134, ante (12 Pet., p. 729.

That this was the intention of the law maker in its enactment, we gather:

1st. From the announcement and solemn declaration of the people of the world.—Either the people solemnly lied, or, those were their objects.

2d. From the mischiefs, and their proper remedy.

History plainly shows that the Union was so imperfect, under the Confederation, that domestic tranquility was in danger, and effective provisions for the common defence and general welfare, could not be made by the general Government, or rather, by the advisory counsel and general Confederacy, whose powers were so limited as to be hardly worthy of the name of Government.

The other mischiefs extended far back into Colonial and British History, and had made revolution and confederation, and finally the formation of this more perfect union, the insuring of domestic tranquility, and provision for the common defence, absolutely necessary to establish justice for the people and secure, to them and their posterity, the blessings of liberty.

3. The preamble and enacting clause are in these words.

4. Contemporaneous construction, in the general Declaration of Independence, in 1776; in the resolutions and actions of the Colonies and original States, and in the writings and utterances of sages of those times,—all testify that *the establishment of justice and the security of liberty* was the great object of the people.

To ascertain the meaning of this fundamental law, the whole must be construed together, and all with reference to this intent and object; and if the words used, fairly convey a meaning which will promote that object, that meaning must be adopted; and any interpretation, inconsistent with the object, must be rejected.

THE SPIRIT OF THE ACT IS:

Justice and liberty. Justice to, and justice from, the citizen; liberty protected by law, and law enforced in justice.

This spirit being understood, the Courts are so to construe the words used, as to suppress the mischief and advance the remedy (Dwarris 614). And so far will this rule apply that other cases, within the mischief and occasion, though not expressly within the words, will be included within the purview (Dwarris, 615 and 616). Again: being *pro bono publico*, it shall be construed in such a manner that it may, as far as possible, attain the end proposed (id. 618).

This Court has already so construed the Act, in assuming jurisdiction in the Yerger Case; scouting with authority the idea, that it had any other object or spirit, than pure justice and liberty (8 Wallace, 85).

And, on the other hand, as applicable to the Acts of Congress, the rules of Common Law agree with this spirit. Acts which abridge the liberty of the subject ought to be strictly construed (Dwarris 646); and those, which impose taxes and burdens, must be clearly and unequivocally expressed (ibid.). Powers, derogatory to private property, must be construed strictly and not enlarged by intendment (id 648); and it may be laid down, as an invariable rule, that *the law favors liberty* (id 675).

SECTION LXXXII.

To attain these Objects,

The people vested in Congress all legislative powers which they granted (Art. 1, S. 1,) and no others; (Note to Hayburn's Case, 2 Dallas, 221).

They vested the executive power in a President (Art. 2, S. 1), who shall take care that the laws be faithfully executed, and shall commission *all* the officers of the United States (Art. 2, S. 3).

They defined these laws—this Constitution, and the laws of the United States, which shall be made in pursuance thereof, * * shall be the supreme law of the land, and this supreme law shall be faithfully enforced, even under the most trying circumstances of State opposition. (Art. 6, 3.)

They vested *the judicial power of the United States* in one supreme Court, *and* such inferior Courts as Congress may from time to time ordain and establish. (Art. 3, S. 1.)

They extended the judicial power to *all* cases in law and equity, arising *under the Constitution* and the laws of the United States. (Art. 3, S. 2, 1).

They provided that the trial of all crimes, except in cases of impeachment, shall be by jury, and that such trial shall be held in the State where the crimes shall have been committed. (Art. 3. S. 2, 3).

They empowered Congress to lay and collect taxes, duties, imports and excises, and to make all laws necessary and proper to carry this power into execution, provid-

ing that all direct taxes should be proportioned to the census. (Art. 1, 3; Art. 1, S. 9, 4), and all duties, imposts and excises shall be uniform, throughout the United States. (Art. 1, S. 8. 1); and that no tax, or duty, shall be laid on articles exported from any State. (Art. 1, S. 9, 5).

All these provisions, and many more, were made to attain the objects, named by the people, if we can take their word; and as the Dred Scott case (19 How. 393) has settled the point that, at the time the Constitution was enacted, the people believed that the Blacks had no rights which white men were bound to respect, and (as a consequence) that no injustice could be done to them. Even Art. 1, S. 9, 1 (forbidding Congress to prohibit their importation within 20 years) indicates that the establishment of justice and the preservation of liberty to men who had rights, required that the Citizen's right to acquire, possess and enjoy property, should be subject to no regulation or control, except that of the respective States, until the instruments of acquisition and trade in this questionable property, which had been acquired under legal sanction, should die out under the withering spirit of this law of liberty.

SECTION LXXXIII.

Construction.

As these were the objects for which the Constitution was ordained, namely: *to establish justice and secure liberty*, every provision of the Constitution must be construed in harmony with this end, unless such construction is forbidden by the plain, clear and exclusive meaning of the words used.

Under this rule must be construed the delegation of power to Congress, to make all laws, necessary and proper to carry into effect the powers vested in it.

Before going farther, let us observe this phraseology: As, of the Magna Charta, not one word should be suffered to escape (2 Co. Inst., 57), so of this Constitution: couched in simplest words, most aptly chosen, each one speaks a volume.

"Congress may make all laws necessary,"—Had it stopped here, it might have seemed as if Congress, in this, was omnipotent, like Parliament: Sovereign and Judge; but, even here, its power is checked, and the word 'proper added. How shall we construe this word? Any means, necessary to an end, an also the proper means for its accomplishment. If this is the correct construction, the sentence involves tautology, and tautology is an exception in this instrument; it also involves a quibble, and the Constitution of a mighty nation is not so mean, as to descend to quibbles, or be construed thereby.

An illustration developes the correct meaning:

A counsel has a right to be heard, and to move the Court; and he may do all things, necessary and proper to

that end;—he enters the Court,—another is speaking,—it is necessary that he interrupt him, to be heard; but, it is not proper;—therefore, he cannot be heard.

So, of this clause: Congress may accomplish its object by all laws necessary, provided they are proper; if improper laws are necessary to succeed, it must fail.

The rule of propriety is found in the spirit of the Act, and the object of its enactment.

The people did not intend to form an instrument, which should defeat the objects for which they created it; and would esteem every Act of Congress, their Agent, which should be at variance with the objects, to accomplish which it was consttiuted,—as improper.

And no statute, which violates any man's liberty, or renders its blessings insecure, or that can work injustice,—can be passed, to carry any of the powers granted, into effect.

None of the powers were granted for such purposes. (Plowden, 437.)

The Constitution of the United States is a law for rulers and people * * * and covers with the shield of its protection all classes of men at all times and under all circumstances.

Exparte Milligan, 4 Wallace, 120.

To this we have appealed, and from the only power which can enforce it, have asked our remedy.

Edward Coby
Counsel for Appellant.
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